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atus: GRANTED

Title: Larry Witters, Petitioner
v.
Washington Department of Services for the Blind

cketed:
nuary 2, 1985

Court: Supreme Court of Washington

Counsel for petitioner: Farris, Michael P.

Counsel for respondent: Minikel, David R.

try	Date	Note	Proceedings and Orders
1	Jan 2 1985	G	Petition for writ of certiorari filed.
2	Feb 6 1985		DISTRIBUTED. February 22, 1985
4	Feb 12 1985		Order extending time to file response to petition until February 16, 1985.
5	Feb 16 1985		Brief of respondent WA Comm. for the Blind in opposition filed.
6	Feb 20 1985		REDISTRIBUTED. March 15, 1985
2	Mar 25 1985		REDISTRIBUTED. March 29, 1985
9	Apr 1 1985		Petition GRANTED. *****
1	Apr 11 1985		Order extending time to file brief of petitioner on the merits until June 6, 1985.
2	Jun 5 1985		Record filed.
3	Jun 6 1985		Brief of petitioner Larry Witters filed.
4	Jun 6 1985		Joint appendix filed.
5	Jun 6 1985		Brief amicus curiae of United States filed.
6	Jun 6 1985		Brief amicus curiae of Christian Legal Society, et al filed.
7	Jun 6 1985		Brief amicus curiae of National Legal Christian Foundation filed.
2	Jun 6 1985		Brief amicus curiae of American Jewish Congress filed.
9	Jun 6 1985		Brief amicus curiae of American Jewish Committee filed.
0	Jun 6 1985		Brief amicus curiae of Rutherford Institute, et al. filed.
2	Jun 18 1985		Order extending time to file brief of respondent on the merits until August 2, 1985.
3	Aug 2 1985		Brief amicus curiae of Anti-Defamation League of B'nai B'rith, et al. filed.
5	Aug 2 1985		Brief amicus curiae of Americans United for Separation of Church and State filed.
6	Aug 2 1985		Brief of respondent WA Comm. for the Blind filed.
7	Aug 2 1985		Brief amicus curiae of ACLU and ACLU of Washington filed.
2	Aug 20 1985		CIRCULATED.
9	Sep 11 1985		SET FOR ARGUMENT. Wednesday, November 6, 1985. (1st case).
0	Oct 30 1985	x	Reply brief of petitioner Larry Witters filed.
1	Nov 6 1985		ARGUED.
2	Nov 6 1985		ARGUED.

84-1070

No.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LARRY WITTERS,
Petitioner,

v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

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QUESTIONS PRESENTED

A blind student who was medically eligible for vocational rehabilitation funds was denied assistance by the Washington State Commission for the Blind on the sole grounds that his vocational objective was to be a pastor, missionary, or Christian education director.

1. Does the Establishment Clause of the First Amendment prohibit a blind student who is studying for the ministry from participation in a federal and state funded vocational rehabilitation program for which he is statutorily and medically eligible?

2. Did the Supreme Court of Washington

State err by applying the "tri-partite" Establishment Clause test to a single, blind student rather than examining the entire statutory program?

3. Did the Supreme Court of Washington State's interpretation of the Establishment Clause actually result in a violation of the Free Exercise Clause of the First Amendment by denying participation in a vocational rehabilitation program to a blind student for the sole reason that his vocational objective was to be a minister, missionary, or Christian education director?

PARTIES

All parties are listed in the caption.

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No.

IN THE
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October Term, 1984

LARRY WITTERS, Petitioner,

v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

Petitioner respectfully prays
that a writ of certiorari issue to
review the judgment and opinion of
the Supreme Court of the State of

Washington entered in this proceeding on October 4, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, which appears as Appendix A hereto, is reported at 102 Wn. 2d 625, 689 P.2d 53 (1984). The dissenting opinion in that court appears as Appendix B. The oral opinion of the Superior Court of Spokane County, Washington, the Honorable Marcus M. Kelly, made on December 11, 1981, which appears as Appendix D hereto, is unreported. The Findings of Fact and Conclusions of Law entered on May 26, 1982, in said Superior Court appear as Appendix C.

Two written decisions were entered by the Office of Hearings of the State

of Washington, Department of Social and Health Services. The initial decision was entered on October 28, 1980 by Paul B. Hutton, Hearings Examiner. This decision is attached as Appendix F. This decision was affirmed on administrative review on December 3, 1980 by Monty Foster, Review Examiner. This decision is attached as Appendix E.

JURISDICTION

This case was decided and judgment was entered by the Supreme Court of the State of Washington on October 4, 1984. The jurisdiction of this Court is invoked under Title 28 of the United States Code Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting

an establishment of religion, or prohibiting the free exercise thereof.
... "

U.S. Constitution, Amendment XIV:

" . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Code of Washington 74.16.181:

"The commission may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. Services provided for under this section may be furnished to clients from other agencies of this or other states for a fee which shall not be less than the actual costs of such services. Under such program the commission may: ...

(3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, and if the same cannot be obtained within the state, provisions shall be made for such purposes outside of the state. Living maintenance during the period of such education and/or training within or without the state may be furnished."

STATEMENT OF THE CASE

Petitioner, Larry Witters, instituted this action as an appeal from an administrative decision which denied funding by the Washington State Commission for the Blind for his vocational rehabilitation program. This matter has proceeded on stipulated facts throughout all stages.

Witters was a student at Inland Empire School of the Bible in Spokane, Washington. He was medically and statutorily eligible for participation in the vocational rehabilitation program administered by the Washington State Commission for the Blind.

This program was funded approximately eighty percent by federal funds and twenty percent by state funds.

Larry Witters was training to become a pastor, missionary, or Christian

youth director. His program was originally exclusively at Inland Empire, but later changed to a combined program with Whitworth College, a private, accredited Presbyterian College. This program results in a degree in Biblical studies from Inland Empire and a Bachelor of Arts from Whitworth College. His course of study included courses in Old and New Testament studies, ethics, speech, and church administration.

Inland Empire School of the Bible is a nondenominational Christian college offering various programs in Christian education including the three year degree in Biblical studies and the Bachelor's degree in cooperation with Whitworth College. Inland Empire School of the Bible is a private religious institution supported by private donations, tuition, and fees.

The procedural history of Larry Witters' efforts to obtain funding is remarkable in that the state agency has, in effect, challenged the constitutionality of its own statute as applied to Petitioner.

The statutory program provides aid to all medically eligible blind persons in need of vocational rehabilitation. There is no statutory exclusion of those studying for the ministry. When Witters applied for assistance, he was denied assistance by the Commission for the Blind solely because he wanted to be a minister.

After Witters applied for aid, the Commission subsequently adopted the following policy statement:

Private institutions or
out-of-state institutions:
The Washington State Constitu-
tion forbids the use of

public funds to assist an individual in the pursuit of a career or degree in theology or related areas.

These state constitutional sections forbid the use of public funding of religious schools. See, Washington Constitution, Art. IX Sec. 4, Art. I Sec. 11. However, others attending religious schools were funded under this program if their occupational objective was something other than training for the ministry. The sole reason for the disqualification of Larry Witters was his goal to be a minister, not the fact that his college was religious in nature.

An administrative review of the Commission's decision resulted in a reaffirmation of the initial denial of assistance. This decision was affirmed by the initial hearings examiner

in the administrative process on October 28, 1980. This examiner acknowledged that Witters raised federal constitutional questions in written memorandum but "dismissed Appellant's U.S. Constitutional arguments since he does not have the authority or jurisdiction to hear and decide such cases." See Appendix F at 6.

Upon internal administrative review, the review examiner gave more consideration, but once again rejected Witters' federal constitutional claims which had been raised in the written memorandum of authorities. The review examiner noted:

The Appellant finally urges that even if the state constitution is construed to deny aid, such denial violates the 14th Amendment and it also violates the First Amendment's guarantee of free exercise of religion. The Appellant's arguments

concerning the 14th Amendment of the United States Constitution are discussed above [See Appendix E at 4] and will not be further discussed here. The First Amendment to the United States Constitution guarantees free exercise of religion. It does not require that the state subsidize religious study.

---Appendix E at 7-8.

An appeal was taken to the Spokane County Superior Court pursuant to the Washington Administrative Procedure Act. The Superior Court upheld the Commission's denial of funds based upon the provisions of the Washington State Constitution which prohibit aid to religious schools.

Witters again raised free exercise and equal protection claims under the United States Constitution in the Superior Court by way of trial brief and oral argument. The Superior Court rejected, albeit somewhat reluc-

tantly, Petitioner's federal constitutional arguments. The trial judge said:

Mr. Farris, you have raised some intriguing arguments that have given this Court fits, for want of a better term. The area that gives me the most concern in this case, is I do not see any conflict between what is done here and either the First Amendment of the United States Constitution, the establishment clause, the practice [free exercise] clause. The area that gives me concern is the equal protection. That gives this Court some concern.

--Appendix D at 31-32.

An appeal was taken to the Washington State Court of Appeals, which then certified the issue to the State Supreme Court because of the importance of the issues.

At both the trial court level and on appeal, the Petitioner took the position that the State Constitution, properly construed, did not prohibit

his participation in this program, but if the State Constitution did mandate his exclusion, the State Constitution was in violation of the Federal Constitution's Free Exercise and Equal Protection Clauses.

At no point in the procedure did the counsel for the Commission for the Blind take the position that granting aid was prohibited by the First Amendment's Establishment Clause.

Faced with federal constitutional challenges to the State Constitutional provisions, on October 4, 1984, the Washington State Supreme Court ruled, in a seven-to-two vote, that the Establishment Clause of the First Amendment of the United States Constitution prohibited aid to Larry Witters because he wanted to be trained to be a minister. Because of this ruling, the State

Supreme Court did not reach a decision on the state constitutional issues.

The Washington Court focused on the "second prong" of the Establishment Clause test and ruled that permitting Larry Witters to participate in this vocational rehabilitation program would have the "primary effect" of advancing religion since his goal was to be a minister.

The majority considered and rejected Witters' free exercise and equal protection arguments in light of its ruling that the Establishment Clause prohibited government aid for his studies. "We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution." Appendix A at 16. "This precludes any need to determine whether the denial of

aid on state constitutional grounds would violate the equal protection clause of the Fourteenth Amendment." Appendix A at 17.

In effect, the State Commission for the Blind has taken the position that its own statute is unconstitutional as applied to Larry Witters. Petitioner has taken the position throughout that the funding program which is open to all medically eligible persons is constitutional, but to deny him aid violates both the Free Exercise and Equal Protection Clauses of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. The Case Presents Important Questions of Constitutional Law Not Yet Settled by This Court.

There are three aspects of this case which present novel and important issues concerning the Establishment Clause of the First Amendment, two of which appear to be absolutely of first impression in this Court.

1. This Court has never considered the issue of the constitutionality of government funded education or vocational training programs which are used by an individual to obtain training for the ministry.

Although programs such as the GI Bill have permitted individuals to be trained for the ministry for several decades, this appears to be a case of absolute first impression

in not only in this Court, but in any court. If this case is permitted to stand, it creates a precedent that would threaten neutral programs such as the GI Bill and other programs of vocational rehabilitation if an individual recipient uses his funds to be trained for the ministry.

The Washington State legislature failed to see any necessity to exclude those studying for the ministry from the statutory program to aid blind people. The legislature considered the program to aid blind people to be trained for work. Obviously, Larry Witters would be trained for a career which has a long standing history of providing jobs for trained individuals. It appears that Washington State stands alone in excluding ministerial students from state-directed vocational rehabilita-

tion programs. The policy statement directing this exclusion was made after this controversy arose. No comparable federal policy or policy from other states has been found which excludes ministerial students from neutral government programs of vocational rehabilitation.

We would respectfully suggest that Washington's unique position on this issue points only to its unconstitutionality.

2. It would appear that the reason that such programs have not been challenged heretofore is that individual recipients of programs such as the GI Bill do not usually get singled out for constitutional examination as was done to Larry Witters. The examination of a single, individual recipient for Establishment Clause

purposes raises important and novel constitutional questions.

The Supreme Court of the State of Washington, used the Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 45 (1971), "tri-partite" test, not to examine the constitutionality of the entire program of vocational rehabilitation for the blind, but rather to examine the constitutionality of aid to Larry Witters. Such questions rarely get raised, because it is rare that a state agency takes the position that its own funding statute is unconstitutional as applied to an individual recipient.

This raises the larger issue of the propriety of using the Establishment Clause as the basis of challenging the eligibility of a single individual in an otherwise neutral government

program. Although individual Establishment Clause challenges have been raised against individual religious institutions, this is the first case which raises the propriety of using the Establishment Clause to challenge the right of a single person to participate in a neutral government program.

This Court needs to address the issue of whether or not the Establishment Clause can be used by either government agencies or by "separation of church and state advocates" to judicially challenge the right of religious individuals to participate in government programs.

The decision of the Supreme Court of Washington represents an opening wedge in a possible entire new arena of church-state litigation if it becomes permissible to challenge individual

recipients of government aid because they might use their funds to foster their "religious goals and objectives."

The holding of the Washington court that permitting the Petitioner to participate in this program would have the primary effect of advancing religion would readily fall by the way if the entire program was examined as opposed to his sole participation. It is doubtful that the primary effect is to advance religion even when considering Witters alone. The primary effect is to train him for suitable employment consistent with his medical condition. But if the program is considered as a whole, as we believe should be done, there is no question that the primary effect of the program is to aid blind people in finding and holding employment through proper

training.

3. Finally, this case represents another important factual variation on a theme which this Court has addressed in several recent cases. Much like the college officials in Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed. 2d 440 (1982), and the drafters of the Tennessee Constitution in McDaniel v. Paty, 435 U.S. 618, 55 L.Ed. 2d 593, 98 S.Ct. 1332 (1978), the Commission for the Blind's excessive zeal to "separate church and state" under the Establishment Clause, appears to have created a clear-cut Free Exercise Clause violation. Although the principle from Widmar and McDaniel that the Establishment Clause needs to be considered in balance with the other First Amendment provisions guaranteeing Free Exercise of religion and freedom of speech

was argued to the Washington court, the majority ignored this line of reasoning. The dissent, however, recognized that the majority opinion's decision to deny aid to Witters premised on the Establishment Clause actually created a Free Exercise Clause violation.

This Court needs to give further consideration to the important principle of keeping the Establishment Clause in balance with the Free Exercise Clause. If lower courts, such as the Washington court in this case, stretch the Establishment Clause beyond its historical purpose, often there is a resulting Free Exercise problem.

II. The Decision Below Is in Conflict With Applicable Principles Established by This Court.

While, as a case of first impression, the decision below does not represent

a direct conflict with a particular decision of this Court, it states principles which ignore, or are opposed to, basic principles which this Court has established in its previous decisions:

1. Although the precise question of an individual using government funding to be trained as a minister has never previously arisen, other cases have presented Establishment Clause questions involving ministers. In each of these prior cases this Court found no Establishment Clause violation, although the "church and state" involvement would appear to have more potential entanglement than is present in this case.

In Marsh v. Chambers, -- U.S. --, 77 L.Ed. 2d 1019, 103 S.Ct. 3330 (1983), this Court decided that it was not unconstitutional to have a minister

hired as a legislative chaplain, paid with tax dollars. This decision was based on the clear historical intent of the framers of the First Amendment. In Marsh the minister was not merely being trained for the ministry, he was doing the work of a minister while on the government payroll.

Larry Witters could be employed by the State of Washington as a minister, either in the legislature or as a prison chaplain. It seems a bit inconsistent to allow a person to be employed as a minister using tax funds, yet prohibiting an individual from using a neutral vocational rehabilitation program to be trained for said vocation.

It is apparent that the Supreme Court of Washington's rationale was simply that the Establishment Clause prohibits the use of tax dollars in

any way which aids an individual minister. This is clearly unsupportable from this Court's decision in Marsh.

Likewise, the Tennessee Constitution was applied to prohibit a minister from seeking public office in McDaniel v. Paty, supra. Tennessee took the position that its constitution required a more stringent "separation of church and state" than was required by the federal constitution. The Tennessee rationale was very similar to the trial court's decision in this matter under the Washington State Constitution.

Tennessee's policy of prohibiting a minister from holding public office, which as a state legislator obviously involves receiving state money, was ruled unconstitutional by this Court. The heart of the Tennessee policy

was to single out ministers for disparate treatment in an otherwise neutral government endeavor. The same thing is true of the Washington policy.

The McDaniel principle that ministers cannot be singled out for disparate treatment was violated by the decision of the Washington court in this case.

2. This Court has ruled in a number of recent cases that it is not a proper use of the doctrine of "separation of church and state" to zealously deny religious activity equal treatment.

In Widmar v. Vincent, supra, this Court ruled that the religious content of speech on a public college campus could not be used as grounds for curbing such speech. In fact, this Court held that to do so created First Amendment violations of free

speech and free exercise.

In Lynch v. Donnelly, -- U.S. --, 79 L.Ed. 2d 604, 103 S.Ct. 1766 (1984), this Court held that the inclusion of a creche in a municipally sponsored Christmas display did not violate the Establishment Clause. This Court permitted the religious element to survive on an equal basis with other expressions of Christmas celebrations.

In Mueller v. Allen, -- U.S. --, 103 S.Ct. 3062, 77 L.Ed. 2d 721 (1983), this Court found that it was not a violation of the Establishment Clause to permit parents of private school students to be given a tax break for tuition payments even though this program was used primarily by religiously educated students. The underlying rationale this Court used in Mueller was that the Minnesota program had

the net result of treating all students in a roughly equal fashion. This decision permitted religious students to be treated in a fashion roughly equal to secular and public school students.

This Court in Lynch clearly indicated that equal treatment for religion was not a new requirement from this Court but rather was mandated by a proper reading of the entire line of church-state cases decided by this Court.

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation...." Committee for Public Education & Religious Liberty v. Nyquist, 413 US 756, 760, 37 L Ed 2d 948, 93 S Ct 2955 (1973). Nor does the Constitution

require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, e.g. Zorach v. Clauson, 343 US 306, 314, 315, 96 L Ed 954, 72 S Ct 679 (1952); McCollum v. Board of Education, 333 US 203, 211, 92 L Ed 649, 68 S Ct 461, 2 ALR2d 1338 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Zorach, supra, at 314, 96 L Ed 954, 72 S Ct 679. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." McCollum, supra, at 211-212, 92 L Ed 649, 68 S Ct 461, 2 ALR2d 1338.

---Lynch, supra, 79 L.Ed. 2d at 610.

These recent cases clearly enunciate this Court's longstanding constitutional framework that in effect says: The Establishment Clause does not require disparate treatment of religious activity

and the Free Exercise Clause does not permit it.

This Court's clear stand on the religion clauses were completely ignored by the Washington Supreme Court when it held that the Establishment Clause requires that an individual blind student who wanted to be a minister be singled out for disparate treatment because his vocational objective was too religious. Larry Witters received "callous indifference" at best, and "hostility" at worst because of his religious career objective, rather than the accommodation that is constitutionally mandated.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Washington State Supreme Court.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY WITTERS,

Appellant,

v.

THE STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

No. 49273-1

DECISION AND OPINION

October 4, 1984

PEARSON, J.

This appeal involves the denial by the Washington State Commission for the Blind¹ (Commission) of financial vocational assistance to a person studying in preparation for a career as a pastor, missionary, or youth

¹The Washington State Commission for the Blind has been renamed the Department of Services for the Blind, effective June 30, 1983. Laws of 1983, ch. 194 sec. 3., p. 1050.

director. The Commission denied appellant Witters' request for financial assistance on March 11, 1980, based on an interpretation of the "religion clauses" of the Washington State Constitution, article 1, section 11, and article 9, section 4.

We affirm the decision of the Commission. We hold the provision of state aid to a person studying to be a pastor, missionary, or church youth director violates the establishment clause of the first amendment to the United States Constitution. Since our state constitution requires a far stricter separation of church and state than the federal constitution (see Weiss v. Bruno, 82 Wn.2d 199, 509 P.2d 973 (1973)), it is unnecessary to address the constitutionality of the aid under our state constitution.

Appellant Witters meets the medical

and physical eligibility requirements for status as a legally blind person, qualifying him to receive vocational assistance pursuant to RCW 74.16. (Repealed, Laws of 1983, ch. 194, sec. 30, pp. 1057-58).

Appellant initially requested financial aid while pursuing a 3-year Bible diploma course of study at the Inland Empire School of the Bible in Spokane, Washington. He later changed to a 4-year program which results in a biblical studies degree from Inland Empire School of The Bible, and a bachelor of arts degree from Whitworth College.

Appellant sought an administrative review of the Commission's decision, which resulted in a reaffirmation of the initial denial of assistance. An appeal was taken to the Spokane County Superior Court pursuant to

the provisions of RCW 74.16.530(1) and the administrative procedure act, RCW 34.04. After the submission of briefs and oral argument, the trial court upheld the Commission's decision to deny financial assistance based upon an interpretation of the Washington Constitution. The trial court's findings of fact and conclusions of law and an order affirming the Commission's decision were entered on May 26, 1982. Appellant appealed that decision to Division Three of the Court of Appeal, which then certified the case to this court pursuant to RCW 2.06.030(2)(d).

I

Appellant seeks financial assistance for his education pursuant to RCW 74.16.181. The relevant portions of this provision read as follows:

The commission may maintain

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or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. Services provided for under this section may be furnished to clients from other agencies of this or other states for a fee which shall not be less than the actual costs of such services. Under such program the commission may:

(3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, and if the same cannot be obtained within the state, provisions shall be made for such purposes outside of the state. Living maintenance during the period of such education and/or training within or without the state may be furnished.

The Supreme Court has developed a three-part test for determining the constitutionality of state aid under the establishment clause of the First Amendment.

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First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-12, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). To withstand attack under the establishment clause, the challenged state action must satisfy each of three criteria.

A. Purpose

Applying the first factor of the Lemon test to the present statute is quite easy. As stated in part in the statute itself:

The commission [for the blind] may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care.

RCW 74.16.181. The secular purpose requirement has become a largely perfunctory inquiry easily satisfied by any legislative recitation of purpose. As the Supreme Court recently states in Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983):

[G]overnment assistance programs have consistently survived this [secular purpose] inquiry ... This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.

Mueller, 463 U.S. at ---, 103 S.Ct. at 3066, 77 L.Ed.2d at 728. The state clearly has an interest in assisting the visually handicapped. We need only look to the above quoted statement of purpose found in RCW 74.16.181 to hold that this statute has a valid secular legislative purpose.

B. Effect

The second part of the Lemon test, that the primary effect of the state aid must neither advance nor inhibit religion, requires that we "narrow our focus from the statute as a whole to the only transaction presently before us." Hunt v. McNair, 413 U.S. 734, 742, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973). Rather than look to the face of the rehabilitation statute, which is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought, we focus our attention on the particular aid sought by the appellant.

In Hunt, the Court offered guidance for making this "primary effect" determination.

Aid normally be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so

pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

(Emphasis ours.) Hunt, at 743, 93 S.Ct. at 2874. Additional guidance is found in Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (plurality opinion).

The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious alike.

Roemer, at 747, 96 S.Ct. at 2345.

The provision of financial assistance by the state to enable someone to become a pastor, missionary, or church youth director clearly has the primary

effect of advancing religion. Appellant is not pursuing a secular course of study with the personal objective of becoming a minister. The curriculum for his course of pastoral study includes classes in Old and New Testament studies and church administration. It is not the role of the state to pay for the religious education of future ministers. We hold that the principal or primary effect of the aid sought by appellant would be to advance religion, and would thus violate the establishment clause of the First Amendment.

C. Entanglement

The third criterion of the Lemon test is that the aid must not foster an excessive government entanglement with religion. In Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Supreme Court set forth a three-pronged inquiry to determine

the existence of excessive entanglement. The relevant factors are: (1) the character and purpose of the institutions that are benefited, (2) the nature of the aid that the government provides, and (3) the resulting relationship between the government and the religious authority. Lemon, at 615, 91 S.Ct. at 2112. Typically this inquiry involves a state legislative attempt to provide aid to all of the state's private schools. For example, Lemon involved both Rhode Island and Pennsylvania statutes which provided extensive state aid to private schools. The Rhode Island statute provided salary supplements for teachers of secular subjects in private schools. The Pennsylvania program involved the reimbursement of private schools for teachers' salaries, textbooks, and instructional materials. The case

before us is much different. This case involves one person's effort to get financial assistance for his theological training. The three-pronged "entanglement" inquiry is ill-suited to this case. In addition, the administrative and trial court records do not provide an adequate factual basis to make the type of inquiry contemplated by the Supreme Court.

Since we have held that the aid sought by the appellant would violate the establishment clause because it would have the primary effect of advancing religion, it is unnecessary for us to attempt a strained analysis of the "entanglement" factor of the Lemon test.

II

Appellant makes two additional arguments: first, that the Commission's denial of aid violates the free exercise

clause of the First Amendment; and second, that the Commission's action violates the equal protection clause of the Fourteenth Amendment.

A. Free Exercise

For a violation of the free exercise clause, one must show "the coercive effect of the enactment as it operates against him in the practice of his religion." School Dist. v. Schempp, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963). The challenged state action must somehow compel or pressure the individual to violate a tenet of his religious belief. In Thomas v. Review Bd., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court noted:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious faith, thereby

putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Thomas, at 717-18, 101 S.Ct. at 1432.

Thomas involved the State of Indiana's denial of unemployment compensation benefits to a Jehovah's Witness who terminated his employment with a company which fabricated steel when he was transferred from the roll foundry to a department that produced turrets for military tanks. He claimed his religious beliefs prevented him from participating in the production of war materials. The Court held the denial of unemployment benefits was a violation of the free exercise clause since it forced him to choose between "fidelity to religious belief or cessation of work. . ." Thomas, at 717, 101 S.Ct. at 7431-32.

In the present case, the Commission's

denial of vocational aid to the appellant did no compel or pressure him to violate his religious beliefs. Appellant chose to become a minister, and the Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for appellant to become a minister, but this is beyond the scope of the free exercise clause. We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution.

B. Equal Protection

Appellant's final argument, that the Commission's action violates the equal protection clause of the Fourteenth Amendment, is quite novel. This argument was premised on the ground that the aid sought was allowable under the

federal constitution, but was denied by the Commission solely because it would violate the religion clauses of the state constitution. Const. art. 1, sec. 11 and Const. art. 9, sec. 4. We have held that to provide the aid sought by the appellant would violate the establishment clause. This precludes any need to determine whether the denial of aid on state constitutional grounds would violate the equal protection clause of the Fourteenth Amendment.

We affirm the decision of the Commission to deny appellants' request for financial assistance.

WILLIAM H. WILLIAMS, C.J, ROSELLINI, BRACHTENBACH, DORE and DIMMICK, JJ. and CUNNINGHAM, J. Pro Tem., concur.

ROSELLINI, Justice (concurring).

I agree with the majority. The

separation of church and state, mandated by Const. art 1, sec. 11 and Const. art. 9, sec. 4, would be violated by financing appellant's vocational instruction as a minister.

The dissent asserts, however, that the majority's decision is rendered "without sufficient facts or justification." This contention is without merit. We need look no farther than the plain language of our constitutional provisions, which state, in part:

No public money or property shall be appropriated for or applied to any religious worship exercise or instruction, or the support of any religious establishment:

(Italics mine.) Const. art 1, sec. 11.

Sec. 4 SECTARIAN CONTROL OR INFLUENCE PROHIBITED. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

Const. art. 9, sec. 4.

Moreover, our interpretation of these provisions has consistently rejected any inroads on the absolute prohibition contemplated by our forefathers. Thus, in Weiss v. Bruno, 82 Wash.2d 199, 206, 509 P.2d 973 (1973), we observed:

In deciding these questions we recognize that the proscription of article 9, section 4 is far stricter than the more generalized prohibition of the first amendment to the United States Constitution. While the establishment clause broadly condemns any law "respecting an establishment of religion," our constitution specifically demands that no public funds be used to maintain or support any school which is under sectarian control or influence. There is no such thing as a "de minimis" violation of article 9, section 4. Nor is a violation of this provision determined by means of a balancing process. The words of article 9, section 4 mean precisely what they say; the prohibition is absolute.

It is indisputable that this more restrictive clause was the deliberate design

of the framers of our constitution.

(Footnotes omitted.)

To finance appellant's career goal of becoming a minister would violate this absolute prohibition. This we cannot do.

APPENDIX B

UTTER, Justice (dissenting):

The majority holds that under the establishment clause of the United States Constitution, the State must single out handicapped college students who wish to pursue religious careers and deny them vocational rehabilitation assistance that is otherwise available to all handicapped college students in Washington. The majority also concludes that denying aid under a general educational program only to those who wish to pursue religious careers does not violate the free exercise clause of the First Amendment. Finally, the majority concludes that the federal constitutional issues should be decided before and to the exclusion of the state constitutional issues that form the primary basis for this appeal. I dissent from all

these decisions.

I.

I agree with the majority that in order to withstand attack under the First Amendment's establishment clause, the granting of educational assistance sought by appellant must satisfy all three parts of the Lemon test, which requires:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

I also agree with the majority's conclusions that the vocational rehabilitation statute has a secular legislative purpose, that the "entanglement" inquiry is ill-suited to this type of situation,

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and that the record does not provide us with sufficient information to find that an unconstitutional level of "entanglement" would result from allowing religious students to take advantage of the same vocational education benefits that are made available to all other handicapped Washingtonians. However, I disagree with the majority's conclusion that granting vocational rehabilitation assistance to all otherwise eligible students would have a "principal or primary effect" of advancing religion in violation of the First Amendment.

The majority relies on two cases for guidance in determining whether the aid sought here would have the primary effect of advancing religion. In Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973), the United States Supreme Court upheld a statute that authorized the issuance

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of revenue bonds for construction of facilities at the Baptist College of Charleston. The Court began its analysis of the "primary purpose" of the scheme by noting that "[w]hatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected." Hunt, at 742, 93 S.Ct. at 2874. The Court went on to hold that the primary effect of the scheme was not to advance religion, because the record did not contain sufficient evidence of the "pervasively sectarian" nature of the Baptist College, or that the state had helped to fund the religious (as opposed to secular) activities of the College. The record in Hunt appears to have been much more detailed and specific about the answers to these questions than the

record in this case.

In Roemer v. Bd. of Public Works, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976), Maryland gave grants to a number of religious and nonreligious colleges, with a statutory requirement that the funds not be used for sectarian purposes. A 3-judge plurality upheld the statute after applying the Lemon test, and finding it unnecessary under the circumstances to elaborate on what constitutes a "specifically religious activity" that would have the "primary effect" of advancing religion. Roemer, at 760-61, 96 S.Ct. at 2351-52. In reaching its decision, however, the plurality observed that a "hermetic separation" between church and state is impossible and has never been required, Roemer, at 746, 96 S.Ct. at 2344-45 and that

religious institutions need

not be quarantined from public benefits that are neutrally available to all. The Court has permitted the State to supply transportation for children to and from church-related as well as public schools Everson v. Bd. of Ed., (citations omitted). It has done the same with respect to secular textbooks loaned by the State on equal terms to students attending both public and church-related elementary schools, Bd. of Ed. v. Allen, (citations omitted). Since it had not been shown in Allen that the secular textbooks would be put to other than secular purposes, the Court concluded that, as in Everson, the State was merely "extending the benefits of state laws to all citizens." Id., at 242 [88 S.Ct. at 1926] Just as Bradfield v. Roberts, (citations omitted) dispels any notion that a religious person can never be in the State's pay for a secular purpose, Everson and Allen put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity.

Roemer, at 746-47, 96 S.Ct. 2344-45

As the discussion above illustrates,

neither of the cases relied on by the majority is directly on point, and each provides only vague, general guidance in deciding the case at bar. A better approach may be gleaned from a line of cases that includes Roemer, but actually begins with Committee for Pub. Ed. & Rel. Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). In Nyquist, the Court struck down a complex set of State programs to aid nonpublic elementary and secondary schools, including a tuition grant program that reimbursed low-income parents for part of the cost of their children's tuition at nonpublic schools. The Court distinguished the invalid tuition grants in Nyquist from the constitutional aid programs upheld in Bd. of Ed. v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) and Everson v. Bd. of

Ed., 330 U.S. 1, 67 S.Ct. 504, 91

L.Ed.2d 711 (1947), as follows:

Allen and Everson differ from the present litigation in a second important respect. In both cases, the class of beneficiaries included all schoolchildren, those in public as well as those in private schools. See also Tilton v. Richardson, *supra*, in which federal aid was made available to all institutions of higher learning, and Walz v. Tax Comm'n, *supra*, in which tax exemptions were accorded to all educational and charitable nonprofit institutions...

Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See Wolman v. Essex, (citations omitted). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance of the "G.I. Bill, 38 U.S.C.

sec. 1651, impermissibly advances religion in violation of the Establishment Clause.

Nyquist 413 U.S. at 782, n. 38, 92 S.Ct. at 2970, n. 38.

The Court also reiterated its earlier observation that there are significant differences between the religious aspects of church-related colleges and parochial elementary and secondary schools, since the former are far less likely to make religious indoctrination a major part of their programs, and are far less likely to to be successful at indoctrinating college students even if they tried to do so. See Tilton v. Richardson, 403 U.S. 672, 685-86, 91 S.Ct. 2091, 2099-2100, 29 L.Ed.2d 790, reh'g denied, 404 U.S. 874, 92 S.Ct. 25, 30 L.Ed.2d 120 (1971); Hunt v. McNair, *supra*, 413 U.S. at 746, 93 S.Ct. at 2875; Nyquist, *supra*, 413 U.S. at 777, n. 32,

93 S.Ct. at 2967, n. 32; see also Americans United for Separation of Church and State Fund, Inc., v. State, 648 P.2d 1072, 1079 (Colo. 1982), Americans United v. Rogers, 538 S.W.2d 711, 717, 722 (Mo.) cert. denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976).

In Wolman v. Essex, 342 F.Supp 399 (S.D. Ohio) aff'd, 409 U.S. 808, 93 S.Ct. 61, 34 L.Ed.2d 69 (1972), cited with approval in Nyquist, the district court permanently enjoined a state program providing, among other things, tuition reimbursement grants to parents of children attending nonpublic elementary and secondary schools, 95% of whom attended Catholic parochial schools. In determining the primary effect of the program, the court looked to "the class to which [the program] is directed and that will be affected

by it" Wolman, at 412. This approach led the court to distinguish the invalid program from the valid programs in Everson, Walz v. Tax Comm'n., 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), and Tilton, on the grounds that the valid programs were directed to abroad class that was not predominately composed of persons attending religious schools, and analogized such cases to situations in which the state provides police and fire protection to all regardless of religious affiliation. Wolman, at 412-13. The Court also dismissed one of the proponents arguments by stating:

Defendants attempt to analogize the statute at bar to statutes which provide economic aid to R.O.T.C. students or student-veterans, regardless of the school at which they attend. This analogy must fail, for if religious schools indirectly derive benefit from such programs, this benefit is entirely incidental

and subordinate to the legitimate secular purposes underlying their enactment - purposes which have nothing whatever to do with religion.

Wolman, at 412, n. 17

Finally, the United States Supreme Court's most recent pronouncement on this issue is found in Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983). In that case, the Court upheld a statute giving the parents of public and private school students alike state income tax deductions for tuition, textbooks and transportation expenses related to their children's primary and secondary education. The program was found constitutional, in spite of the fact that about 95% of students attending private schools in the state attended sectarian schools, Mueller, 103 S.Ct. at 3065, 3070, and that public school children had no tuition payments to

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deduct. See Mueller at 3070. The Court considered several factors in determining that the scheme did not have a primary effect of advancing religion, two of which are applicable to the case at bar:

Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools. Just as in Widmar v. Vincent, (citation omitted), where we concluded that the state's provision of a forum neutrally "open to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of State approval," so here: "the provision of benefits to so broad a spectrum of groups is an important index of secular effect."

In this respect, as well as others, this case is vitally different from the scheme struck down in Nyquist. There, public assistance amounting to tuition grants, was provided only to parents of children

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in nonpublic schools. This fact had considerable bearing on our decisions striking down the New York statute at issue; we explicitly distinguished both Allen and Everson on the grounds that "In both cases, the class of beneficiaries included all school children, those in public as well as those in private schools." ... Moreover, we intimated that "public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian or public-non-public nature of the institution benefited," ibid, might not offend the Establishment Clause. We think the tax deduction [in this case] is more similar to this latter type of program than it is to the arrangement struck down in Nyquist. Unlike the assistance at issue in Nyquist, [this scheme] permits all parents - whether their children attend public school or private - to deduct their children's educational expenses. As Widmar and our other decisions indicate, a program... that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We also agree with the Court of Appeals that, by

channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of State approval" ... can be deemed to have been conferred on any particular religion, or on religion generally.

(Footnotes and citations omitted.) Mueller, at 3068-69.

The vocational rehabilitation program in the case at bar is a general financial aid program for handicapped students that is available or potentially available to all handicapped students regardless of their religion, their plans to attend a public or private, sectarian or nonsectarian college, and their secular or religious career goals. It is highly unlikely that only a very small percentage of the

handicapped students benefited by the program would choose to pursue religious career training, and that those that do will provide the institution they attend only indirect and incidental benefits from state funds resulting entirely from the individual student's own personal, uncoerced choice of college, a situation that grants no "imprimatur of state approval" for any particular religious college or career. Furthermore, as discussed below, it is unclear from the record whether the instruction Mr. Witters wishes to receive is sectarian or involves religious indoctrination in any meaningful constitutional sense, although the fact that the instruction occurs at the college level would probably lead the United States Supreme Court to assume that the instruction was not so tainted. Even if the instruc-

tion were sectarian, however, as long as the program grants vocational rehabilitation aid to all handicapped students equally, the fact that a few might choose to spend their money on vocational training with a religious career in mind does not give the program a "principal or primary effect" of advancing religion. The clear trend of recent federal caselaw discourages such a result, and we should not go beyond the interpretation of the United States Supreme Court in construing the federal constitution.

II

Appellant also argues that denying him financial assistance that is available to all other handicapped Washingtonians solely because he wishes to pursue a religious career is a violation of the free exercise clause of the federal bill of rights. The majority

points out that to show a violation of the federal free exercise clause, one must show "the coercive effect of the enactment as it operates against him in the practice of his religion". Majority, at 7 (quoting School Dist. v. Schempp, 374 U.S. 203, 223 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963)). Although I do not dispute this statement as an abstract proposition, I disagree with the majority's peremptory conclusion that denying appellant assistance that is available to all other persons similarly situated solely because of his religious career goals does not constitute "coercion." In McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978), for example, the United States Supreme Court held that a state's constitutional prohibition on ordained ministers serving in the state legislature and its limited

constitutional convention violated the federal free exercise clause.

The Court stated:

the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be. Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention. Yet under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of the one on the surrender of the other. Or, James Madison's words, the State is "punishing a religious profession with the privation of a civil right." In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively

penalizes the free exercise
of [his] constitutional
liberties."

(Citations omitted. Bracketed material in original.) McDaniel, at 626, 98 S.Ct. at 1327. In this case, as in McDaniel, appellant is forced to choose between pursuing his religious career and taking advantage of certain benefits or rights that the State provides to all other similarly situated persons. While there are some obvious distinctions between denying a person the right to run for office and denying him financial assistance because of his religious occupation, I believe that both constitute "coercion" within the meaning of the free exercise clause, since both penalize the choice of a religious career.

Two other United States Supreme Court cases also support this conclusions. In Sherbert v. Verner, 374 U.S. 398,

83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Court held that the federal free exercise clause prohibited a state from denying unemployment compensation benefits to a worker who was fired because her religious beliefs prevented her from performing Saturday work assigned to her by her employer. The Court explained its decision by stating that

"[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." ... Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion

in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

(Citations omitted.) Sherbert, at 404, 83 S. Ct. at 1794. The Court added that the constitutional infirmity could not be cured by holding that unemployment compensation is merely a privilege rather than a right, since "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege." Sherbert, at 404, 83 S.Ct. at 1794.

Similarly, in the more recent case of Thomas v. Review Board, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court quoted extensively from Sherbert in deciding that unemploy-

ment compensations could not, consistent with the mandate of the free exercise clause, be denied to a person who quit his job because his religion prohibited from participating in the production of military weapons. The Court held that

[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, at 717-18, 101 S.Ct. at 1432.

Finally, I question how the State's policy in the case at bar can be found consistent with its obligation under the federal free exercise clause to "accomodate" religion. See Sumner

v. First Baptist Church, 97 Wash.2d 1, 12, 639 P.2d 1358 (1982) (Utter, J. concurring); Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 964 (1952).

The facts of this case are very similar to those in Sherbert and Thomas. While the State is not obligated to provide handicapped vocational education assistance, once it decides to do so I believe that the free exercise clause forbids the state from penalizing those who have chosen religious careers by excluding them from a general financial aid program solely for that reason.

III

The majority holds that "the provision of state aid to a person studying to be a pastor, missionary, or church youth director violates the establishment clause of the first amendment to the United States Constitution." Majority, at 5. The majority

goes on to state that "[s]ince our state constitution requires a far stricter separation of church and state than the federal constitution ..., it is unnecessary to address the constitutionality of the aid under our state constitution." Majority, at 5.

For guidance in future cases before the courts of this state we should comment on the position our state constitution requires us to hold. An in-depth analysis of the historic purpose and meaning of Const. art. 1, sec. 11 shows that that provision does not prohibit the use of public money for the purposes proposed by Mr. Witters, and that the State's denial of aid to Mr. Witters based on the misperceived mandate of Const. art 1, sec. 11 was improper.

A

When the delegates to the Washington Constitutional Convention met in Olympia on July 4, 1889, their single overriding purpose was to pave the way for Washington's admission into the Union. In order to gain for Washington the long-sought status of a sovereign state, the delegates had to agree on a constitution that was acceptable to Congress, which had spelled out some of its requirements in the Enabling Act that authorized the Convention. In addition, the new constitution would have to be approved by a majority of Washingtonians, many of whom were deeply concerned with the then-current debate over the proper relationship between government and religion.

Section four of the Enabling Act commanded that "provision shall be made (in the new constitution)

for the establishment and maintenance of systems of public schools, which shall be open to all the children of (Washington), and free from sectarian control." 25 Stat. 676 (approved Feb. 22, 1889) reprinted in Revised Code of Washington, vol. 0 (1983). This provision reflected a widespread concern about the still-common practice of Bible reading and other forms of sectarian religious instruction in the public primary and secondary schools. See D. Boles, *The Bible, Religion, and the Public Schools* 35 (1961). Such practices were particularly offensive to the recent waves of Catholic and Jewish immigrants who objected to their children receiving compulsory instruction in the majority Protestant faith. See D. Boles, *supra* at 28-30, 32. Similarly, many Protestants objected to giving public subsidies to Catholic

parochial schools. See generally B. Parkany, "Religious Instruction" in the Washington Constitution (1965) (thesis available in the Washington State Library); D. Boles, supra.

In the decades before the Washington Constitutional Convention, the Republicans, who dominated the Convention, became the primary advocates of church-state separation. For example, in 1876 and 1880 the Republican party platforms called for a federal constitutional amendment "'forbidding the application of any public funds or property for the benefit of any school or institution under sectarian control.'" B. Parkany, pt. 2, at 11.

The Democrats, with their large urban Catholic constituency, were said to favor tax support of parochial schools. B. Parkany, pt. 2, at 7; D. Boles, at 30-31. By 1889, however,

due in part to the efforts of the famous educator Horace Mann, this was a minority position. The general consensus in Washington and the rest of the nation was that public schools should not give sectarian religious instruction, and that private parochial schools should not be supported by public funds. See B. Parkany, pt. 2, at 14; D. Boles, at 23-27, 33. This attitude was reflected in many state constitutions, including Washington's, that were written in the last half of the 19th century. D. Boles, at 33-34.

That the Convention was concerned with forced religious instruction in public primary and secondary schools and public aid to parochial schools is supported by a number of circumstances surrounding the adoption of the "religious instruction" clause itself. On July

17, 1889, the Seattle Post-Intelligencer and the Tacoma Morning Globe both printed the Bill of Rights Committee's first draft of Const. art. 1 sec. 11, which at that point contained no mention of "religious instruction." It read, in pertinent part: " No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution."

Two days later, on July 19, the Portland Oregonian, which was one of the most widely read newspapers in Washington Territory, ran an editorial concerning "religious instruction" in public schools. The editorial, which was prompted by a debate in an eastern journal on the same subject, used the phrase "religious instruction" six times, and concluded with a strong stand:

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In order that liberty of conscience may remain inviolate as intended by our constitution builders, there must be an absolute separation of church and state, religion and public schools; and in order to guide the public school system onward to the fulfillment of the mission that called it into existence, it is necessary to keep the public schools free from religious influences, from theological disputes and sectarian teachings....

... Religious instruction in the public school means a gradual retrogression to the union of church and state, and this union means a tyrannical government and a corrupt priesthood.... Religious instruction ought not to be ignored, but the home and church are the places wherein both precept and example will be most effective; but if liberty of conscience is valued at all, keep religion away from the public schools.

The Oregonian, July 19, 1889, at 4, col. 2.

On the same date, the Spokane Falls Review ran an article on the

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same subject. The Review article, which also used the phrase "religious instruction," summarized the positions of eminent clergymen on both sides of the debate. Spokane Falls (Daily) Review, July 19, 1889, at 3.

Two days later, the Oregonian printed a lengthy and thoughtful letter responding to the Oregonian's "religious instruction" editorial. The letter stated:

Whenever the Protestant version of the Bible is read as an act of worship in the public schools, the consciences of Roman Catholics, Jews, agnostics, spiritualists, materialists and those holding several other forms of faith, are violated. Wherever, as in some localities, Catholic sisters or priests appear in the public schools, in their religious garb, and conduct religious worship in conjunction with their work as teachers, the conscientious objections of all denominations except the Catholic are disregarded. Whenever the Lord's prayer is recited or extempore prayer

is made, or religious hymns are sung, the religious views of some portion of the people are trampled upon in an institution sustained by enforced taxation and which should be open to all. To this it is answered by the advocates of these policies that religious instruction of some kind is an essential part of education. And to this, again, the opponents of these policies reply that, whether religious instruction be essential to education or not, it is not a kind of instruction which can be imparted in public schools.

Letter from B.F. Underwood, The Oregonian, July 21, 1889, at 6. cols. 5,6. Mr. Underwood concluded:

As the right of the majority to govern the individual in matters of religion is not now delegated by any American constitution to any legislature, the right stands reserved to each American citizen, and any exercise of it in the least degree by a legislature is a usurpation of tyranny unjust and unrepugnant.

On July 25, a few days after the flurry of newspaper editorials,

327 (1925). It also provides strong evidence about the history and circumstances of the enactment and the evils that the constitutional provision were intended to correct, both of which may be considered in constitutional construction. See Yelle v. Bishop, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959), State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 146, 247 P.2d 787, 795 (1952), Bowen v. Department of Social Sec., 14 Wn.2d 148, 150, 127 P.2d 682, 684 (1942) and Sears v. Western Thrift Stores, 10 Wn.2d 372, 382, 116 P.2d 756, 761 (1941).

Additional and even more convincing evidence about the meaning of the phrase "religious instruction" can be found in the relevant debates on Const. art 9, sec. 4, which occurred four days after the Conventions final passage of Const. art 1, sec. 11.

B. Rosenow ed. at 268, 328-29. At that point, Const. art. 9, sec. 4, read, "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Tacoma Ledger, Aug. 11, 1889, at 4, col. 2. Mr. Comegys, a member of the Bill for Rights Committee, unsuccessfully tried to amend this section on the floor of the Convention by adding the words, "and no religious exercises or instructions shall be permitted therein." B. Rosenow, ed., at 329; Tacoma Ledger, at 4. Mr. Comegys explained the need for the amendment to his fellow delegates by stating that "sectarians had not been by the courts prohibited from reading Bibles or prayers. That was not toleration to Jews, Catholics, agnostics, Mohammedans and ~~several~~ other creeds and sects who were entitled to it as much as

a few days after the flurry of newspaper editorials, articles and letters to the editor on religious instruction in the public elementary and secondary schools, the Bill of Rights Committee submitted its amended report to the Convention. The new draft, which was later adopted by the Republican-dominated Convention, without debate, read in pertinent part as follows:

No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction or the support of any religious establishment.

Journal of the Washington State Constitutional Convention, 1889, at 500 (B. Rosenow ed. 1962) (analytical index by Q. Smith) (hereinafter B. Rosenow ed.). See also B. Parkany, pt. 1, at 1.

While I can find no direct evidence that the members of the Bill of Rights Committee borrowed the phrase, "religious

instruction" from the newspaper pieces that were published between the first and the final drafts of its report, the circumstantial evidence is strong. Moreover, even if the nearly simultaneous uses of the phrase, "religious instruction" by the delegates and the newspapers were merely coincidental, the frequent use of the phrase in the popular press and the contemporaneous public concern on the subject of religious instruction in the public primary and secondary schools with which the phrase was connected does provide uncontradicted evidence as to the "common and ordinary meaning " of the phrase and what it would have meant to a delegate or voter in 1889. See generally State ex. rel. Albright v. Spokane, 64 Wash.2d 767, 770, 394 P.2d 231, 233 (1964); B.F. Sturtevant Co. v. Industrial Comm'n, 186 Wis. 10, 19, 202 N.W. 324,

327 (1925). It also provides strong evidence about the history and circumstances of the enactment and the evils that the constitutional provision were intended to correct, both of which may be considered in constitutional construction. See Yelle v. Bishop, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959), State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 146, 247 P.2d 787, 795 (1952), Bowen v. Department of Social Sec., 14 Wn.2d 148, 150, 127 P.2d 682, 684 (1942) and Sears v. Western Thrift Stores, 10 Wn.2d 372, 382, 116 P.2d 756, 761 (1941).

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Protestants..." Tacoma Ledger at 4, col. 2.

One early Washington case directly addresses the intent of the framers in drafting Const. art.1, sec 11. In State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P.35 (1918), this court held unconstitutional a plan to give public high school students credit for studying the Bible outside of school. Although the current validity or applicability of much of that case is questionable in light of Calvary Bible Presbyterian Church v. Bd. of Regents, 72 Wash.2d 912, 436 P.2d 189 (1967) cert. den. 393 U.S. 960, 89 S.Ct. 389, 21 L.Ed.2d 372 (1968), no subsequent case has challenged the accuracy of the Dearle court's statement that

it is a matter within the common knowledge of those who followed the discussion

attending the framing of our [state] constitution that it was the purpose of the men of that time to avoid all of the evils of religious controversies, the diversion of school funds to denominational schools and institutions, and the litigation that had occurred in other states... The question then was-and the people who adopted the constitution wer so advised - whether we hold adopt a constitution which provided in terms that no religious instruction should ever be a part, directly or indirectly, of the curriculum of our schools.

(Italics mine) Dearle, 102 Wash. at 381, 173 P.35.

The early Attorney Generals' opinions also demonstrate that Const. art 1, sec. 11, was applied primarily in the context of prohibiting certain kinds of devotional sectarian instruction in public primary and secondary schools. See e.g., AGO, Sept. 19, 1891, (Bible reading, prayers, and devotional religious exercises in public schools prohibited

by Const. art. 1, sec. 11), AGO Dec. 20, 1909, (unconstitutional to open public school day with prayer); AGO, March 24, 1916, (unconstitutional to give public high school credit for optional Bible study).

From all of the above evidence, I conclude that Const. art. 1, sec. 11, with its use of the phrase, "religious instruction," was intended merely to prohibit sectarian religious instruction in the public schools, and to prevent direct public subsidies to parochial schools. There is no indication the framers had the slightest intention of making a secular career goal a constitutional prerequisite for any type of aid to the "poor and infirm." See generally, Const. art. 8, sec. 7. No such problem existed at the time our constitution was drafted, and we should not, by judicial interpretation,

extend its words to cover situations that the document's text and history indicate were never contemplated by the drafters.

B

Even if Const. art. 1, sec. 11 were meant to prohibit educational assistance to handicapped persons seeking "religious" vocational instruction, the record does not support a finding that "religious instruction" is involved here. Appellant Witters was denied funds not because the college of his choice was religiously oriented, but because his vocational objective was to become a pastor, missionary or youth director.

As demonstrated by the sole applicable Washington case, the only way to determine whether Mr. Witters proposed instruction is religious within the meaning of Const. art. 1 sec. 11 is to examine

the instruction itself and see whether it is taught in an objective manner or in a devotional manner that resembles worship or indoctrination Calvary Bible Presbyterian Church v. Bd. of Regents, supra. Although the record is notably lacking in evidence regarding the manner of instruction, the parties had stipulated that "[Mr. Witters] classwork consists of classes instructional in nature for which he pays tuition. There are also devotional chapel services at the school for which he pays nothing." Petitioner's Proposed Factual Stipulation, dated Aug. 11, 1980 (signed by counsel for both parties); see also Appellant's Memorandum of Authorities (before the Hearings Examiner) at 6. The parties also stipulated that the college Mr. Witters wished to attend was not a denominational or sectarian institution, but offered instruction on a nondenomina-

tional basis. Verbatim Report of Proceedings, at 6.

Aside from the stipulated facts, the record is totally devoid of any independent evidence as to how the courses were taught. Such courses as Old Testament history and church administration could well be taught in an objective, nondevotional manner, even in a private "religious" college. It is likely that all or most of those attending the college are already believers of various religious doctrines, and attend the college to gain factual and practical knowledge that will help them attain their career objectives and teach others what they believe to be true. If the court wished to determine whether Mr. Witters received devotional instruction in violation of Const. art. 1, sec. 11, it should remand the case so that the appropriate

fact-finding body could determine just how the courses were conducted. See Calvary Bible Presbyterian Church v. Bd. of Regents, supra, State ex rel. Gunstone v. State Hwy Comm'n, 72 Wn.2d 673, 674-75, 434 P.2d 734 (1967); Skold v. Johnson, 29 Wn. App. 541, 630 P.2d 456 (1981); Franklin Cy. Sheriff's Office v. Sellers, 97 Wn.2d 317, 323, 646 P.2d 113 (1982) cert. denied 459 U.S. 1106, 103 S.Ct. 730, 74 L.Ed.2d 954 (1983).

C

There was also some contention by the State that providing vocational rehabilitation aid to Mr. Witters would violate article 9, sec. 4 of the Washington Constitution, and there is language in Weiss v. Bruno, 82 Wn.2d 199, 509 P.2d 973 (1973), that would support such a proposition. The arguments before this court in

this case have not provided us at this time with an adequate basis for declining to follow that case. My conclusions that the free exercise clause prohibits denial of vocational rehabilitation aid to Mr. Witters would make any possible bar established by Const. art.9 sec.4 and Weiss irrelevant, however, since under the supremacy clause state constitutions must yield to directly contrary provisions of the federal constitution. The question of the continuing vitality of Weiss may therefore be reserved until a more appropriate case arises.

IV

I would hold that the granting of vocational educational assistance to Mr. Witters would not violate Const. art. 1, sec. 11; that any bar to such aid presented by Const. art. 9, sec. 4, as interpreted in Weiss is overcome

by appellant's federal constitutional right to freely exercise his religious rights; and that the federal establishment clause does not bar the type of aid sought here. Such a result would be consistent with both the historic meaning of our state constitution and the American tradition of religious liberty as embodied in the free exercise clause of the First Amendment and as reflected in the current trend of cases emanating from the United States Supreme Court.

DOLLIVER, J., concurs.

APPENDIX C

IN THE SUPERIOR COURT
FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 80-2-04706-4

LARRY WITTERS,

Plaintiff,

vs.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE coming on regularly
for hearing before this court on December
11, 1981, plaintiff being represented
by his attorney, MICHAEL P. FARRIS,
the defendant appearing by and through
its attorneys, KENNETH O. EIKENBERRY,

Attorney General, and ERNEST M. FURNIA, Assistant Attorney General, and the court having heard and considered the evidence of and on behalf of the parties and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1) That plaintiff Larry Witters has met and does meet the medical and physical eligibility requirements specified under Chapter 74.16 of RCW for status as a legally blind person qualifying him to receive educational assistance.

2) That the program by the Commission for the Blind is publically funded by a combination of approximately 80% federal funds and 20% state funds.

3) That plaintiff Witters, was, at the time of the original hearing, enrolled as a student in the Inland Empire Bible School in Spokane, Washington.

4) That the Inland Empire Bible School is a private institution supported by private donations and tuition payments by students who attend that particular institution and is managed by a Board of Directors.

5) That the Inland Empire Bible School provides a Christian Education on a nondenominational basis offering a one-year Bible certificate, a three-year Bible diploma and a four-year Bachelor of Arts Degree.

6) That plaintiff Witters was originally pursuing a three-year Bible diploma course of study in order to equip himself for a position as a pastor, missionary or youth director, and is presently participating in the four-year program for the same vocational purpose.

7) That the curriculum for such a course of pastoral study included

Old and New Testament studies, ethics, speech and church administration.

8) That a policy statement for the Washington State Commission for the Blind established by the Commission states:

"Private institutions or out-of-state institutions: The Washington Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas."

9) That plaintiff Witters was denied Vocational Rehabilitation funds by the Washington State Commission for the Blind upon grounds for disqualification found in said policy statement.

From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1) That the objective and purpose of RCW 74.16 is to create the Commission

for the Blind as a Washington State Commission and that RCW 74.16.181(3) specifically allows said Commission to provide for special education or training in business, professions or trade and to provide the payment of certain funds for such.

2) That RCW 74.16.450 empowers this Commission, through the director, to serve as the sole agency of the state in preparing, adopting and certifying state plans, rules and regulations for the blind and visually handicapped as set forth in this chapter and to seek federal funds for the same.

3) That Article IX, Section 4 and Article I, Section 11 of the Washington State Constitution direct that no public funds be used or maintained to support any sector which is under sectarian control or influence and that school systems are to be maintained

free from sectarian control.

4) That the Washington State Supreme Court in issues dealing with religion and religious affiliation has determined that public funds are not to become involved in the practice of religion or the fostering of religious education.

5) That the Commission has the right, under its authority to make rules, regulations and plans, to consider certain constitutional and statutory inhibitions in the application of its funding powers.

6) That the policy established by the Commission, of not providing public funds for a degree in theology or related areas, is applied and enforced uniformly to the particular relevant group of people, the visually handicapped, and thus there is no denial of equal protection to that restricted group.

7) That the policy established by the Commission was correct in the application of its funding powers in determining that the use of public funds, directly or indirectly, may not be provided to assist plaintiff in the pursuit of this specific course of study, career or degree in theology or related areas.

DONE IN OPEN COURT this 26th day of May, 1982.

MARCUS M. KELLY, Judge

IN THE SUPERIOR COURT
FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 80-2-04706-4

LARRY WITTERS,
Plaintiff,

vs.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,
Defendant.

ORDER

THIS MATTER, having come on regularly for hearing in open court, plaintiff, Larry Witters, appearing by and through his attorney, MICHAEL P. FARRIS, the defendant, State of Washington Commission for the Blind, appearing by and through its attorneys,

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KENNETH O. EIKENBERRY, Attorney General,
and ERNEST M. FURNIA, Assistant Attorney
General, and the court, having reviewed
the record and considered all the
evidence on behalf of the parties,
and having entered its Findings of
Facts and Conclusions of Law and being
fully advised, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED
that the Administrative Order of the
Commission for the Blind is hereby
affirmed;

IT IS FURTHER ORDERED, ADJUDGED
AND DECREED that this matter be dismissed
with prejudice.

DONE IN OPEN COURT this 26th
day of May, 1982.

MARCUS M. KELLY, Judge

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APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 80-2-04706-4

LARRY WITTERS,

Petitioner-Appellant,

v s .

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

JUDGE'S DECISION

VERBATIM REPORT OF PROCEEDINGS
Before Hon. Marcus M. Kelly

FOR THE PETITIONER:

Michael P. Farris

Attorney at Law

P.O. Box 1219

Olympia, Washington 98407

APP D-1

FOR THE RESPONDENT:

Ernest M. Furnia
Assistant Attorney General
DSHS - M.S. : PY-13
Olympia, Washington 98504

BE IT REMEMBERED that the above cause came regularly on for the trial on the 11th day of December, 1981, before the Hon. Marcus M. Kelly, Department 10, Spokane County, Washington, the petitioner and respondent appearing through their respective counsel, and the parties having announced they were ready to proceed, the following proceedings were had:

THE COURT: All right. I am quite sure counsel are aware, but because Mr. Witters is also present, I would like him to be aware that I have had possession of the record in this case. I did not just get it today. I have

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had it for some time and I have had the benefit of both counsel's briefs and I thank both counsel for their briefs in this case. Again, I have had the file for some time and I have been through and studied the record on more than one occasion. I likewise have reviewed, considered and studied the briefs on more than one occasion. I have read some of the cases. I will not say I have read every case cited in the briefs. Specifically, so that you are aware, Mr. Witters, this is something the Court has had to consider. It is not a consideration or decision being made merely after hearing argument today.

The arguments, of course, advanced here today have been relatively close to those put forth in the trial briefs. If I were, of course, to decide this case basically upon feeling or sentiment

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or sympathy, it would probably be no surprise to counsel that my sympathies or , what have you, would be to grant relief in this court. I am merely observing, having been a product of parochial schools and private schools with strong religious affiliation during all of my education. I cannot decide this case in that manner. I have had to decide it upon the facts. I do not really have to resolve any facts in this case. We have stipulated facts. I must start with those particular facts and, in effect, interweave them into the law, as I read the law and the law which has been argued to this particular Court. This field, counsel both probably know and maybe specifically, Mr. Farris, I don't know how often Mr. Furnia has been in this particular field, the separation of church and state is a tremendous field of litiga-

tion. All you have to do is look at the number of cases that have gone before our State Supreme Court and before the United States Supreme Court. It indicated that it presents issues that have been in litigation for years and years.

Some of the matters even touch upon, I can recall as a child, as I say, having attended parochial schools; in effect what was attempting to be done in some of the schools I have attended. I am a little older than the Weiss v. Bruno case, which was decided not that long ago.

I start initially with the fact that we do have a specific law we are dealing with here. That is contained in Chapter 74.16 of RCW. The purpose of that law, as I read it, is to basically assist, in various manners, people who are visually handicapped, to prepare

them in effect to become and to be selfsupporting. The law does grant certain authority or allow certain programs. I will state this, that the entire law is not too extensive. One of the objectives or purposes of the law is set forth specifically in 74.16.181, which is that portion that confronts this Court today; specifically subparagraph 3 which allows the Commission, which is created by this particular law, as a State Commission, to provide for special education or training in business, professions, or trade and provide the payment of some certain funds.

All right. This law does create the Commission for the Blind; does specify to a certain extent its make-up. While it does specify what its make-up is, I note among that among that make-up that a specific number of the persons

on the Commission must be, if I can use the term, legally qualified blind persons. I am aware that there is a refraction in sight that fits within the term of what may be legally blind. This law further, and specifically Section 74.16.450, empowers this Commission, through the director, to serve as the sole agency of the State in preparing, adopting and certifying State plans, rules and regulations for services for the blind and visually handicapped as set forth in this chapter and to seek federal funds for the same.

Now, it does empower them with certain other powers that do not appear to be at this point appropriate to this determination other than the right of review, which avenues have been followed bringing this case here today.

I start initially with the Commission

is empowered in effect to certify and adopt, plan and rule. Now, I am assuming that, pursuant to this particular authority, the Commission in this case did establish the policy statement that is stipulated in this case; the policy statement or that portion of the policy statement which is the subject matter of this present lawsuit. No question has been raised, at least I did not note in the argument here any question raised as to the authority of the Commission to establish policies or regulations. The question is, does that commission have the authority to establish this particular criteria in this particular case; this field, that is, the field of separation of church and state. I use that in very broad terms, talking about public funding and religious affiliation. Looking at and studying the cases by both

sides, both Supreme Courts, U.S. Supreme Court and our State Supreme Court there is a body of law where narrow, narrow lines seem to be constantly drawn. I agree with you, Mr. Farris. You cite the Blanton case, I believe, to clarify for you in trying to determine what yardstick the United States Supreme Court uses and saying this is okay, and that is not okay, it's difficult. The statute here, of course, is completely silent as to any constitutional limitations. I agree with Mr. Furnia that that is the general procedure. As a general rule you do not have the legislature attempting to determine in advance and provide in their own particular laws what is constitutional and what is unconstitutional. Because I have not been into it before, I am somewhat surprised to find the one reference, I believe, it was 28

B. I am not too sure of it. Specifically, that says these funds shall not be used. Now whether there was a bootstrapping arrangement, I don't know, but I was surprised to find that within the law. The fact is that no law, I don't think it can be argued against or gain said, in any manner exists in a vacuum, any law, whether it be as part of our State Constitution, the United States Constitution or our statutes. Enacted law must be read and must be considered within the whole fabric or framework of all the law that touches upon a particular area. In this particular case where we have public funds involved, and again there is no question that they are public funds, what effect the mixture of state and federal I think would have in this particular case, I am not making a determination. I

am saying we are talking about public funds. The fact that public funds are involved to me activates and brings into play the whole panoply of laws and constitutions that deal with public funds. As part of that law, as I say, are the cited cases from our Supreme Court. I am just using the two that have been argued, at least by the State in this case; the Weiss case in 82 Wn.2d and the Higher Education case in 84 Wn. 2d as examples. We have the two provisions in our State Constitution that play a role in this particular case, before I even address the Federal Constitution, and that is Article I, Section 11 of the State Constitution dealing with religious freedom, which on its language initially, I think is broader, even than the Federal Constitution. I think throughout, at least in my comparisons in various

areas where I have looked, our State Constitution and our Federal Constitution in some areas, has it broader than the Federal Constitution in some areas has it more restricted, The provision which concerns the Court today, Section 11 reads:

"No public monies or property shall be appropriated for or applied to any religious worship, exercise or instruction or the support of any religious establishment..."

All in the disjunctive. I might point out argued orally, Mr. Farris, but I notice you did make some argument in your brief with reference to chaplains in our institutions. I am sure you are aware there is a specific exception in our State Constitution covering those and I would just point out in this same section, Section 11, just

to answer a question raised in the brief. It reads as follows:

"provided, however; That this article shall not be construed as to forbid the employment by the State for chaplains for penal and mental institutions as in the discretion of the legislature may seem justified."

You did not raise it orally and I was ready to answer you rather rapidly in your brief, because I did find specific constitutional provisions. The other area of our State Constitution that this case involves inferentially or otherwise is Article IX, Section 4 which states:

"All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

I start with the proposition or understand-

ding in this case that the factual situations and the issues before the Court in the case of Weiss v. Bruno and somewhat in the case of Higher Education Assistance v. Gray, are not really factual akin to what we are looking at here today. If I can quote from the Wizard of Oz, this is a horse of a different color. We are not in this particular case attacking the statute, the statutory authority that sets up the Commission that allows the funds to be disbursed. We are in effect questioning the application or non-application of those funds by the Administrative Board or Administrative Agency. Of course, in these two cases, the two cases I am referring to, there was a specific law that required certain things to be done. Under that law, specifically in the Weiss case, it dealt both with the primary grades and with college education. The Higher Education, itself, on the other hand, concerned itself with

higher education, as the name indicated, on the college level. In the Weiss case, an agency, there is no question, the agency in applying that particular law geared to a specific group which turned out to be a group dealing with or having a uniform religious belief. I believe the Weiss v. Bruno case, the bulk of the funds that were to be disbursed in that particular case were geared at or received by the Roman Catholic faith. I feel that what I must do--these cases are relevant here in consideration the reasoning, the reasoning for the Court. Our State Supreme Court, in arriving at the various conclusions it did arrive at in these cases, and in other cases, the Weiss case talked about needy. Some of what we could substitute in this particular case, the term, "visually handicapped," for "needy."

It raised the issue of whether or not the proposal or funding proposal which, I believe, in the grade school case was

to go directly to the recipient. I do note that Judge Brachtenbach who wrote the opinion had some difficulty in wanting to know how a six-year-old was going to endorse the warrant. My feeling as I approached the matter before me, is somewhat of Judge Brachtenbach's feeling. We are in an area talking about equities, about feelings and what have you. Some sympathy would be on a particular side. We are faced with certain laws. We are faced with certain well-established principles of law, principles of constitutional law. There was a contention in the Weiss case that the particular law which in that case granted funds. What I am saying, the Court's reasoning in this case, starting with Weiss, the reasoning in the case before it, contained every particular on the opposite side of the coin. In the Weiss case they took that the granting, that is , the disbursement of these particular funds violated the

establishment clause of the First Amendment of the Constitution, the United States Constitution. They also argued that it violated Article IX, Section 4 of our State Constitution which deals with schools in Article I, Section 11 of the State Constitution which is basically our religious freedom. The language from this Weiss case is something that the Court has considered when arguments are made with reference to the purpose, the laudatory effect, of the legislation before it. The Court in the Weiss case remarks at Page 205:

"Neither recognition of the accomplishments of these schools nor appreciation of the laudable purpose of the statute can overcome the clear constitutional provisions which the members of this Court have sworn to uphold."

It then goes on and I think gives somewhat of an insight to our State Const-

itution. At Page 208, it discusses Article IX, Section 4, which again is dealing with funding of the schools, pointing out that it is far stricter than the more generalized provision of the First Amendment of the United States Constitution. It talks about our constitution, meaning our State Constitution. It specifically directs that no public funds be used or maintained to support any school which is under sectarian control or influence and talks about there is no such thing as diminished violation which was touched upon by Mr. Farris in his argument. It goes on to point out in that case that it is indisputable that the more restrictive clause was the deliberate design of the framers of our constitution, meaning our State Constitution, that required again the school system to be maintained free from sectarian control. Granted the Weiss case deals with the school system. They point out that there was an attempt to

strike the words, "or influence," in that particular session and it failed. In other words, it showed apparently the framers of our State Constitution; their frame of mind. This case also touches upon, though I could not obtain a stipulation here, the question of what we are talking about; aid, whether it be incidental, indirect or direct. It says that our State courts no longer make that particular distinction. It talks about how attempts have been made under the laws of this particular state, that is the State of Washington, dealing with bussing. I am talking about bussing to, not bussing from school to school, but providing free transportaion under the exercise of police powers to all pupils and how that was struck down; attempting to, in effect, I won't use the term, "circumvent," but to see if some neutral group or some ground could be established with the schools. There was an attempt to exercise

police power. This case points out that the police power, broad and extensive as it is, may not be exercised in circumvention of constitution inhibitions. The tenor apparently of the Washington Courts, I do not know, Mr. Farris, I do not presume to be that astute a student of the constitution, but I do not know whether it is correct or not that Washington is the only state at this time that will not permit the use of rehabilitation funds in any sort of religious education. I don't know, but the tenor of these cases certainly indicated the feelings of our State Supreme Court.

This case also talks about reading various constitutional provisions together. The Higher Education case again directs itself over and touches upon, as I recall, this case involved in effect allowing a governmental agency to obtain loans for students to pursue higher education. Our State Supreme

Court made very short shift of that. It made reference to Weiss v. Bruno; held that use of public funds directly or indirectly was unconstitutional and that they attempted to do here was a violation in this case. It makes mention both of Article IX, Section 4 of the State Constitution and Article I, Section 11 of the State Constitution. It is in this vein, I feel, the Court must review the issue that is before it.

I assume both counsel are probably aware, especially in the criminal field in this state, our State Supreme Court is more and more looking to the State Constitution than the Federal. Whether there is going to be a clash, I don't know, but I cannot completely put these cases out of my mind in making any decision that I must make. Now, I will address myself initially to the argument of whether or not the Commission here is attempting, in effect, to say that this statute is

unconstitutional as it applies to Mr. Witters in this case.

Going back to the fact that a law cannot be construed in a vacuum, I do not think that the Commission could on the other hand blindly disburse these funds without paying any attention to certain constitutional and other statutory inhibitions.- Their action here, at least in my judgment, is not making some sort of constitutional determination or unconstitutional determination of the underlying law, but deals with the application of this particular law. I feel that the Commission is empowered to make rules, to make regulations, to establish plans. It in effect has the implied authority to make the plans or establish the plans they have and in so doing it cannot close its eyes to the restrictions that are placed upon the use of public funds. So I do not see their action in this case as attempting to declare the over-all or underlying law

unconstitutional in its application. I think it has a right to do so in its application. That doesn't answer the further question, but I think it has the right to do that. So I can easily see the distinction and find the argument of the State in this case more persuasive on that particular issue than the argument of the petitioner. I noted that the Weiss case does discuss in detail -- not the Blanton, that apparently was a case that was more recent than the Weiss case. It does discuss to a certain extent the Lemon v. Kurtzman case which is cited in counsel's brief. It is the case that I cannot recall, Counsel, right offhand without going through this rather lengthy opinion; it picks up, or I know, synthesizes the tripartite test that has been argued before me. I note there is discussion in that and I note apparently even our own State Supreme Court, even looking at some of those cases, have materially

held the way they have held and it would appear, in some cases arguably, in contravention of those holdings.

Counsel for the petitioner has raised in his argument what effect the ruling of this Court or any court might have on the over-all system or people in other schools. I feel, as I pointed out to the State, that the extent of my jurisdiction and my authority in this particular case is a decision of the case before me upon the facts that have been developed in this case and have been stipulated. I will leave, I think, I must leave, as a trial court, the far-reaching effect of any decision to one of our courts of review or our State Supreme Court.

One of the reasons I was interested and I did question Mr. Farris about any decisions in the case of the G.I. Bill. That apparently is an area as I understand it, Mr. Farris, that has existed and they have

just turned their backs on it and have not made any decision on it; is that correct?

MR. FARRIS: At least at the appellate--Federal Appellate level, that is correct. There may have been a trial court case. It brings to my mind that Madelyn Murray tried it once and wasn't successful at the appellate level. To my knowledge, no.

THE COURT: If there were some determination on that particular thing, the U.S. or a state supreme court case, it might have some affect here. As I say, I am aware. I obtained part of my schooling at Gonzaga on a G.I. Bill. There is another area and I don't know whether it was necessarily argued by counsel or if counsel asked the Court to pick it up. In the Weiss case, I am noting, and it is contained in the footnote on Page 206. That talks about possible qualification on the sleeping prohibition, as our State Supreme Court

says, of the Constitution, Article IX, Section 4, which concerns schools, would result from conflict with the free exercise clause of the First Amendment to the United States Constitution:

"No question is raised here of infringement of any person's right to the free exercise of his faith. The question is not whether a student may attend a religious school, but whether the State may subsidize that attendance. No element of coercion has been suggested by the respondent's and the free exercise clause is not involved in these cases."

So at least that thought is in Weiss v. Bruno, and the thought must have been within our State Supreme Court's mind.

In reviewing my notes, gentlemen, because a number of issues have been raised, I think both parties have touched upon it. The Court knows what the law requires

about the Court participating in ruling about various constitutional issues before they are presented, or need to be ruled upon or going into particular constitutional issues that, in effect, might be a gratuitous ruling, depending on what your initial ruling is. I have had benefit of the effect of that in a case that I had several years ago on which I spent considerable time working on an opinion on various constitutional issues. Our Supreme Court picked on one and said we don't have to pay attention to the rest. It was an opinion I worked on for about three months but that's maybe-- we shouldn't have that in the record--again, this is an example, but this case has given me concern. These cases do not necessarily fit. I have considered the various arguments. I am speaking of Federal cases specifically advanced by the petitioner in this case. If I turn around, I must contrast that with our State Constitution and what our State

Supreme Court says our Constitution says and what I would anticipate our State Supreme Court would say what our Constitution says in this particular case. To say that what the State did or the State Commission did in this particular case with reference to Mr. Witters was improper, I would, as pointed out by Mr. Farris, in effect have to rule that our State Constitution is unconstitutional. That puts the Court in another dilemmic situation. The upshot basically of all this ruminating on the Court's part or thinking out loud, is I think it is well established in this particular state how our court, our State Courts, have reviewed our State Constitution in certain areas. If religion is involved anywhere, or sectarianism, our courts have a tendency to hold it is violative, that is, when public funds become involved under the Constitution. I think, as I say, of the case where they attempted to allow

nonpublic students to ride on school buses. I can think of another case. I do not recall whether or not it proceeded beyond the trial court level. It was what was referred to as the release time cases. I don't know whether that is now essential in this particular state. People in public schools were seeking to have time release to attend religious exercise. Problems were encountered in that. Initially, as I say, I do not recall further than what the initial determination was, that it was improper. From my own standpoint, this particular case, at least apparently, or the case that was mentioned recently in the paper, allowing apparently, some sort of religious activity on state-funded campuses may be in effect a harbinger of this coming the other way. I don't know. I try to determine what is before me and not what is going to happen in the future.

It certainly appears to be, and I did note in that particular article, that

the primary cause, if as I read the article, the primary basis for that ruling was apparently freedom of speech and whether the court in that case completely sidestepped establishment or the establishment clause or the practice clause of the First Amendment is not known. Quite frankly, the conclusion that I am constrained to come to here and I use that term advisedly, constrained, is that the acts of the Commission here were correct. I have some concern in my own mind. One of the arguments, is it correct. I have considered the argument using the tripartite, especially the involvement in religion in this case. If we take that and work backwards, I am tempted--I hope counsel is following the Court's reasoning--I am taking basically a premise that says something and turning it around and going backwards. The one that talks about if the schools or governing body must become embroiled or enmeshed in making a determina-

tion. Here the position the Commission takes keeps them completely out of it. It just says this specific course we will not fund. To me starting and going back--am I being clear to counsel in my reasoning? Maybe I am not expressing myself, but this could be a pure noninvolvement situation by saying that we will not fund a theological rather than relying on my memory--well, in effect what they are saying is that we will not use public funds to assist an individual in the pursuit of a career or a degree in theology or related areas. To me, that is an extremely neutral position. I have wrestled in my own mind with what Mr. Farris has argued. Has it become neutral to the point that it is no longer neutral? In looking at the other side side of the coin, are we attempted to establish a religion of nonreligion? Mr. Farris, you have some intriguing arguments that have given this Court fits, for want of a better term.

The area that gives me the most concern is this case, is I do not see any conflict between what is done here and either the First Amendment of the United States Constitution, the establishment clause, the practice clause. The area that gives me concern is the equal protection. That gives this Court some concern.

Now, in reaching the conclusion, again, I feel I must make, in view--there is some slight reference to equal protection in the Weiss v. Bruno case. There is a very short shift referral. But I start initially in this case with a body of law that is dealing with a selected group of people to begin with; that is, people who are visually handicapped. It is a special enactment. The policy so far as those people are concerned, at least established by the Commission, would appear to be uniform to that particular group of people. The policy says that we will not use public funds for a degree

in theology or related fields.

Now, in my own mind I am trying to determine whether or not I am boxing myself in in making that determination. Within that specific field, the application is uniform. Granted, the result would be in this particular case to restrict, it would appear to me, anyone within that particular field from the pursuit of theological studies. But the fact that I have before me, that policy, and I have nothing to the contrary, apparently is enforced within this particular field, those of the visually handicapped. We will not fund those particular things. We cannot fund those things. I cannot, unless I am missing a point, Mr. Farris, I invite you to comment within that field--that is a uniform application of that particular policy. I do not see a denial of equal protection to that restricted group.

MR. FARRIS: Well, there are two things that I think the Court's ruling raises. One

is there an application-type discrimination. I would say there is not. Everybody who would have a vocational goal that would be pastoral or religious being treated the same. It is not being unfairly administered, but I think it is different. The equal protection clause requires more than that. It requires that the difference be based upon a purpose, that is founded upon the over-all purpose of the legislation. That is the part that we have argued as missing.

THE COURT: I see that argument. I see those distinctions. As I say, throughout your argument of counsel and in all these cases, the Court seems to be drawing extremely, extremely fine lines, but I feel that must be read in conjunction with the very same language. The language that has been extremely, strictly construed by our State Supreme Court deals with religion and religious affiliation. The tenor, at least in this state, seems to be public funds just are

not to become involved in anything that would smack or even hint of the practice of religion, the fostering of religious education. It is basically, I think, gentlemen, something that you and the Court finds itself with as a fact of life.

Now whether I had anticipated--I am not inviting either party--either way that I may have determined that the matter would go up maybe in this particular situation. Whether our State Supreme Court could see a distinction from what I envision, the programs as such that they have previously ruled on in this state, in this case I don't know. The purpose of the statute, as I say, is laudatory. Its effects, if it were, you know, carried out, and I assume they are being carried out, is laudatory. It does have the effect and, as I say, it was unfortunate that Mr. Witters wishes to pursue a theological degree or pastoral type of work which I find most commendable.

But as I read it, gentlemen, as I read these particular laws it does stop him from the use of these particular funds in pursuing that goal. As I say, it is a decision, whether it is any consolation to Mr. Witters, as an individual, I don't personally like to make, but as a judge I feel I must make in this case, in my judgment and my interpretation.

So I would ask, Mr. Furnia, if you would draw whatever Findings and Conclusions are necessary as affirming the decision of the Commission.

(Whereupon at 12:32 p.m. Court adjourned.)

APPENDIX E

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OFFICE OF HEARINGS

Docket No. 0480A-237

In re LARRY WITTERS,
Appellant.

DECISION AND ORDER ON PETITION FOR REVIEW

ISSUE

May the state Commission for the Blind provide financial assistance to an other ise eligible recipient for the purpose of enabling the recipient to enroll in a Bible school to prepare himself to become a pastor, missionary or Christian educator?

FINDINGS OF FACT

APP E-1

I.

The Appellant is eligible for services from the state Commission for the Blind. One of the services provided by the Commission is funding for eligible persons for training or education. The Appellant seeks funding to attend Inland Empire School of the Bible to pursue education and training to become a pastor, missionary or Christian educator.

II.

The Commission has refused to grant financial assistance for this purpose, citing a Washington State constitutional prohibition. The Appellant appealed from the Commission's denial, and an administrative hearing was convened. In his Initial Decision, the trial Examiner concluded that payment of funds for this purpose violated Article I, Section 11 of

the Washington State Constitution, affirming the action of the Commission. The Appellant has petitioned for review of the Initial Decision, alleging errors as follows:

(1) Denying the Appellant funds because of a religious occupational goal is a denial of equal protection of the law because the distinction is not reasonably related to the purpose of the statutory aid.

(2) RCW 74.16 does not purport to disqualify the Appellant and the Commission cannot usurp the power of the Legislature to make legislative determinations.

(3) The State Constitution does not prohibit granting of aid for vocationally rehabilitative purposes even in church-related schools.

(4) Even if the State Constitution is construed to deny aid, not only does such denial violate the 14th Amendment, it also violates the First Amendment's guarantee of free exercise of religion.

CONCLUSIONS OF LAW

I.

Article I, Section 11 of the Washington State Constitution provides in pertinent part:

No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment...

It is clear on its face that this provision prohibits the type of aid sought by the Appellant. This provision exists to protect the principle of separation of church and state. It applies equally to all citizens, and is not in violation of the 14th Amendment of the United States Constitution.

The statutory aid alluded to by the Appellant in his first assignment of error apparently refers to RCW 74.16.181, which provides for services to assist visually handicapped persons

to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. That statute is subject to the restrictions of Article I, Section 11, of the state constitution, set forth above.

II.

In his second assignment of error, the Appellant contends that RCW 74.16 does not purport to disqualify the Appellant, and the Commission cannot usurp the power of the legislature to make legislative determinations. The main thrust of the Appellant's argument here is that the Commission is not empowered to apply criteria for eligibility beyond those mandated by the legislature. However, the language of RCW 74.16 is permissive rather than mandatory in nature. In addition, it is a well-recognized principle that where a statute is

capable of two possible constructions, one of which will render it constitutional and the other unconstitutional, the legislature will be presumed to have intended a meaning consistent with constitutionality. The Commission, in determining that funds could not be paid to the Appellant under the circumstances of this case, has adhered to that principle. The constitutionality of RCW 74.16 becomes an issue only when that statute is interpreted as the Appellant urges. It is well within the power of the Commission to apply RCW 74.16 in a manner consistent with the clear mandate of Article I, Section 11 of the state constitution.

The Appellant's third assignment of error is to the effect that the state constitution does not prohibit granting of aid for vocationally rehabilitative purposes even in church-related

schools. The Appellant notes that there are many students in the State of Washington attending church-related colleges receiving vocational rehabilitation funding, and contends that the constitutional provision relates only to instruction that is devotional in nature. The distinction is that the purpose of that aid is to advance secular rather than religious studies. The fact that vocational rehabilitation funding is available for secular studies at church-related schools has no relationship to the facts of the current case. It is clear, as discussed above, that the Commission is under a constitutional prohibition and cannot fund the course of studies undertaken by the Appellant here.

III.

The Appellant finally urges that even if the state constitution

is construed to deny aid, such denial violates the 14th Amendment and it also violates the First Amendment's guarantee of free exercise of religion. The Appellant's arguments concerning the 14th Amendment of the United States Constitution are discussed above and will not be discussed further here. The First Amendment to the United States Constitution guarantees free exercise of religion. It does not require that the state subsidize religious study.

DECISION AND ORDER

The Initial Decision entered in this matter is in all respects affirmed.

DATED at Olympia, Washington, this 3rd day of December, 1980.

MONTY FOSTER
Review Examiner

APPENDIX F

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OFFICE OF HEARINGS

Docket No. 0480A-237

In re LARRY WITTERS,
Appellant.

INITIAL DECISION

A hearing in the above-entitled matter was conducted by PAUL B. HUTTON, a duly qualified Hearings Examiner. The stipulated facts were agreed to by the Appellant's attorney, Michael P. Farris, and by the Respondent's attorney, Ernest M. Furnia, Assistant Attorney General, and in consideration of said facts and their respective written arguments and memorandum of

authorities, the Hearings Examiner makes the following:

ISSUE

May the State of Washington's Commission for the Blind provide financial assistance to an otherwise eligible recipient for the purpose of enabling the recipient to enroll in a Bible school to prepare himself to become a pastor, missionary or Christian educator?

FINDINGS OF FACT

I.

The Appellant is eligible for the state's Commission for the Blind services. One of the services provided by the Commission in [sic] funding to eligible persons so that they can be trained to engage in gainful employment and become self-supporting.

II.

The Appellant wants to enter

Inland Empire School of the Bible to pursue education and training to become a pastor, missionary or Christian educator. The Commission has refused to make a financial grant to Appellant for this purpose, citing a Washington State Constitutional prohibition.

III.

The Appellant claims the Commission's decision: (1) denies him the services and assistance he was entitled to under the provisions of the enabling legislation; (2) denies him equal protection of the laws under the 14th Amendment to the U.S. Constitution; and (3) denies him rights which are guaranteed under the U.S. Constitution even if prohibited by the State Constitution.

IV.

Article I, Section 11, of the Washington State Constitution states:

"... no public money or property shall be appropriated for or applied to any religious workshop, exercise or instruction, or the support of any religious establishment...."

Article IX, Section 4, states: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

V.

The Commission's financial grant of assistance to Appellant would, or could, be used for tuition, books and other school related fees to permit Appellant to obtain his career goals.

CONCLUSIONS OF LAW

I.

The Commission for the Blind delegated the authority to hear and decide their grievance to the Department of Social and Health Service, which

has jurisdiction to hear and decide the same pursuant to RCW 74.16.520 and Washington Administrative Code (WAC) 388-08-002.

II.

To provide financial assistance to Appellant to enable him to pay for his education at Inland Empire School of the Bible to pursue training or education of a religious character would be in contravention of Article I, Section 11 and Article IX, Section 4 of the Washington State Constitution.

III.

It must be assumed that the legislature intended its aid services to the blind to be constitutional. Recipients for the Commission's services may pursue occupational and educational goals that will reduce their dependence on the state. The career goals being sought by Appellant would, or could,

lead to gainful employment which might eliminate that dependence. But in light of the State Constitution's prohibition against the state directly or indirectly supporting a religion, that specific education and training sought by Appellant could not be funded by the Commission.

IV.

The Hearings Examiner notes but dismisses Appellant's U.S. Constitutional arguments since he does not have the authority or jurisdiction to hear and decide such cases.

DECISION

The decision by the State of Washington Commission of [sic] the Blind to refuse to fund Appellant's education and training at the Inland Empire School of the Bible, to enable him to become a pastor, missionary, or Christian education [sic], is affirmed.

DATED at Spokane, Washington, this
28th day of October, 1980.

PAUL B. HUTTON,
Hearings Examiner

7/11/85 - Supreme Court, U.S.
FILED

FEB 16 1985

ALEXANDER L. STEVAS,
CLERK

2
NO. 84-1070

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1984

LARRY WITTERS,
Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

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Attorney for Respondent

BEST AVAILABLE COPY

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Attorney for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Would payment by a state agency to a sectarian school or college for a person's theological education, which person is medically eligible for a state funded vocational rehabilitation program, constitute a violation of the Establishment Clause of the First Amendment as applied to the states through the Fourteenth Amendment?

2. Does a refusal to pay a sectarian school or college for the education and training of a person to become a minister, missionary or Christian youth director constitute a violation of the Free Exercise Clause of the First Amendment as applied to the states by the Fourteenth Amendment?

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COUNTERSTATEMENT OF THE CASE

Respondent feels obligated to make a counter statement of the case because petitioner continues to add "facts" that were not a part of the record, that have never been established by competent evidence and misstates the facts that were established.

Larry Witters applied to the Washington State Commission for the Blind (hereinafter Department) ¹ for financial assistance to attend the Inland Empire Bible School to pursue a course in pastoral studies with a goal of becoming qualified to become a minister of the church. The Department denied Mr. Witters' request for financial assistance. Mr. Witters has

¹ The Washington State Commission for the Blind has been renamed the Department of Services for the Blind effective June 30, 1983, Laws of 1983, ch. 194, § 3, p. 1050.

unsuccessfully sought a reversal of that initial decision. This matter has proceeded on stipulated facts as reconstructed by the trial court with the assistance of counsel. Those findings of fact are set out in petitioner's Appendix C. Any other "facts" indicated by Mr. Witters in his Statement were not and are not competently established, such as, the affiliation of Inland Empire Bible School with Whitworth College, Petitioner's Brief in Support, p. 6; that the Department (then Commission) adopted its policy statement on religious careers after Mr. Witters applied for aid, Brief in Support, pp. 7-8. Further, there was no factual determination that others attending religious schools were funded under this program if their occupational objective was something other than training for the ministry.

These are only examples and do not represent all inaccuracies.

On appeal to the Washington State Supreme Court, that court held that permitting Mr. Witters to have his training for the ministry paid for by the state would have the "primary effect" of advancing religion and therefore violate the Establishment Clause of the First Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. The Washington State Supreme Court further held that the refusal to provide financial assistance would not violate the Free Exercise Clause of the Federal Constitution. Having based their decision on federal constitutional grounds, the state supreme court did not consider the state constitutional challenges.

SUMMARY OF ARGUMENT

One of the basic tenets of the foundation of this country is the principle of the separation of church and state. Although that separation is not absolute and accommodation must be made, this court has never decided that a state must use its tax dollars to promote religion by funding the theological education of persons wishing to become ministers, missionarys or religious youth directors. This case does not present "an important question of federal law which has not been, but should be, settled by this Court." To fund religious instruction would have a "primary effect" of advancing religion and, therefore, violate the Establishment Clause of the First Amendment of the Constitution which is applicable to the states through the Fourteenth Amendment.

Further, the refusal to fund petitioner's religious education would not prohibit him from freely exercising his religious beliefs. No one is stopping him from becoming a minister if that is, indeed, what he wishes. No one is stopping him from practicing his religion. Nor is this an "equal access" case wherein petitioner is prevented from exercising his religion or religious beliefs. All persons who wish to have the state pay for their religious training in order to become ministers, missionarys or religious youth directors are denied access to those funds.

The Supreme Court of the State of Washington correctly decided this matter under the three-pronged test found in Lemon v. Kurtzman, 403 U.S. 602 (1971) and the petition for a writ of certiorari should be denied.

ARGUMENT

1. This Case Does Not Present An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

A. Funding Petitioner's Theological Training At A Sectarian School Violates The Establishment Clause Of The First Amendment.

Although petitioner would suggest that this case presents novel and important issues concerning the Establishment Clause of the First Amendment, the only novelty of this case is that it comes to the court in the reverse posture of many Establishment Clause cases. The state is not trying to fund sectarian schools, nor is the state trying through some "secular purpose" statute to attempt to aid and promote religion. This is the reverse of your

typical aid-to-sectarian schools case. The state, in administering a secular purpose vocational education program authorized by a state statute, refused to give tax dollars to a sectarian school for the sectarian purpose of training and educating its ministers.

Petitioner would suggest that the court has never considered a case where funding of the religious education of an individual has come under constitutional challenge. Respondent would reply that there has never been an issue where the court has been asked to rewrite the history of the United States and rule that states must use their tax dollars to fund the religious training and education of sectarian ministers.

There is nothing at issue in this case about payment of the cost of secular education in a sectarian setting or tax

credits for the cost of providing basic education for a child. See, e.g., Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed. 2d 721 (1983). This case is nothing more than a blatant attempt to force the state to spend its tax dollars to advance and promote religious aims by paying a sectarian institution to educate its future ministers. The idea is absurd and can be based only upon a serious misreading of history, the decisions of this court, as well as the principles of the First Amendment.

The Supreme Court of the State of Washington viewed the three-pronged analysis as set forth in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971) as an appropriate guide to determine whether the aims sought by petitioner would violate the

Establishment Clause of the First Amendment of the constitution. The First Amendment, of course, is applicable to the states. Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). As stated in the Lemon case, to determine if state aid is constitutional under the Establishment Clause, a particular governmental funding scheme must have a secular purpose, the primary or principle effect must be one that neither advances nor inhibits religion, and the governmental conduct will not foster an excessive governmental entanglement with religion. Lemon v. Kurtzman, 403 U.S. at 612-13. It is well settled that if one prong of the test is breached, the challenged governmental conduct would violate the Establishment Clause. See, e.g., Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66

L.Ed. 2d 199 (1980). Although the court has indicated that the three-pronged test is not the only test that the Supreme Court would consider, Lynch v. Donnelly, --U.S.--, 104 S.Ct. 1355, 79 L.Ed. 2d 604 (1984), nonetheless, the court has used this test in practically every major case with the exception of Marsh v. Chambers, --U.S.--, 103 S.Ct. 3330, 77 L.Ed. 2d 1019 (1983).

Petitioner would suggest that the "tripartite test" was not appropriately used because it focused on the constitutionality of state aid to the petitioner. Yet the primary effect of a statute can only be determined from the facts before it. The court must narrow its focus from the statute as a whole to the only transaction presently at issue. See Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed. 2d 923 (1973).

While the Washington statute, RCW 74.16.181, to assist the visually handicapped is facially neutral, as applied to petitioner, it has the primary effect of advancing religion. A secular purpose and facial neutrality is not enough if, in fact, the state is providing direct, immediate and substantial benefit to a religious activity, i.e., paying for a religious education, not a secular vocational education.

Under all of the principles enunciated by this court, the state supreme court properly determined that Mr. Witters request for financial assistance should be denied.

B. Not Paying For A Person's Religious Instruction Does Not Violate The Free Exercise Clause Of The First Amendment.

Petitioner would further indicate that the state's refusal to pay for petitioner's education and training to become a minister, missionary or Christian youth director created a clear-cut Free Exercise Clause violation. Petition, p. 21. However, the Supreme Court of the State of Washington correctly applied the tests promulgated by this court to determine whether or not petitioner was compelled or pressured to violate a tenet of his religious belief or that the Department's regulation had a "coercive effect" upon him in the practice of his religion. See Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963). Petitioner had chosen to become a minister² and the Department's only

² Mr. Witters may have abandoned the pursuit of this training since he subsequently contacted the

action was to refuse to pay for his theological education.

This is not similar to McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed. 593 (1978) cited by petitioner. In that case the court held a Tennessee statute which made provisions of Tennessee's constitution disqualifying ministers or priests of any denomination from serving as legislators applicable to candidates for a constitutional convention unconstitutional as violating the rights of clergymen to free exercise of religion under the First and Fourteenth Amendment. In order for a minister to have the free exercise of his religion, he had to surrender his right to seek office. The court found that

Department seeking financial assistance to go to diesel mechanic training and, then later, nursing training.

requirement to be unconstitutional. In this case petitioner is not prevented from going to a sectarian school to become a minister. The state is only refusing to subsidize his training and education to become a minister. The interest of maintaining the separation of church and state is a legitimate interest and the means selected in this case are reasonably necessary to achieve that end. Witters is not treated any differently than any other individual who wishes to pursue a theological education to become a minister.

Nor is Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed. 2d 440 (1981) of assistance to petitioner. In that case the court held that a state university's refusal to grant a student religious group access to university facilities generally open to other

student groups was unjustifiable and constituted content-based discrimination against speech. There was no evidence that religion would dominate such an open forum and an "equal access" policy would not have the primary effect of advancing religion. Further, the court noted that religious worship and discussion are forms of speech and association which are protected by the First Amendment. In this case advancement of religion would be a primary effect of funding the theological education of a person intending to become a minister. Yet to deny petitioner the state funds to seek that vocational goal would not prohibit him from worshipping nor going to school nor becoming a minister. The funding of theological education has been left to the religious denominations themselves or to private citizens. Further, in Widmar

v. Vincent, supra, this Court found that all three prongs of the Lemon test had been met so that university policy did not violate the Establishment Clause. It was only then that the Court determined that the policy would have violated the Free Exercise Clause.

CONCLUSION

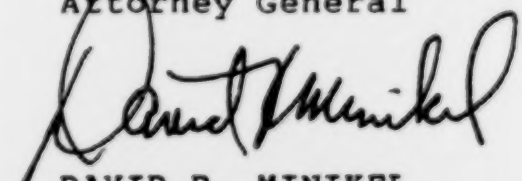
The Department of Services for the Blind joins with petitioner in stating that the decision of the Supreme Court of the State of Washington does not represent a direct conflict with any decision of this court. Petition, p. 22-23. The issues presented do not represent a substantial federal question that have not been decided by this court nor represent issues that should be further considered by the court. The decision below found that state payment of the education of Mr. Witters to become

a minister would violate the Establishment Clause of the First Amendment of the Federal Constitution since the primary effect of paying for that training would be to advance religion. Therefore, respondent requests that the petition for a writ of certiorari be denied.

DATED this 14th day of February, 1985.

Respectfully submitted,

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Attorney General



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Office • Supreme Court, U.S.

FILED

JUN 6 1985

ALEXANDER L. STEVENS

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON

DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

On Writ Of Certiorari From The
Supreme Court of the State of Washington

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED JANUARY 2, 1985
CERTIORARI GRANTED APRIL 1, 1985

1214

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¹The Findings of Fact and Conclusions of Law contained in the Petition for Certiorari were a preliminary copy. The final copy entered by the Superior Court contained minor modifications. We therefore include the correct version herein.

STATE OF WASHINGTON
Dixy Lee Ray, *Governor*
COMMISSION FOR THE BLIND
3411 South Alaska Street
P.O. Box 18379, Seattle, Washington

March 11, 1980

Michael P. Farris, Attorney at Law
North 2610 Pines Road
Spokane, Washington 99206

RE: Larry Witters

Dear Mr. Farris:

This will confirm our meeting on Thursday afternoon, March 6. At that time I held an administrative review of this agency's decision regarding financial assistance for Mr. Witters to attend a Bible college to pursue a course in "pastoral studies."

As I mentioned to you at that time, the Washington State constitution states that no public money or property shall be appropriated for, or applied to, any religious worship, exercise, or instructions. Legislative enactment in 1971 of RCW Sec. 28B.10.830 through 28B.10.836 deals further with this subject and states that "No aid shall be awarded to any student who is pursuing a degree in theology."

While you maintain that Mr. Witters is not pursuing a degree in "theology" but rather in "pastoral studies," I do believe that by whatever name the proposed training must be considered religious instruction. In Mr. Witters' own words he states that his goal is to be "a minister of a local church." As such, I must reaffirm the decision of this agency in denying financial participation toward pursuit of this vocational goal.

If Mr. Witters finds this decision unsatisfactory he may request from the Commission, and will thereupon be

granted, a fair hearing pursuant to chapter 74.16 RCW. A client who desires a fair hearing must request such hearing within thirty days after receiving notice from the Commission of the findings of the administrative review. A fair hearing will be provided by the director of the Washington State Commission for the Blind, or his designee, and will be held within fifteen working days after the submission of the request. The fair hearing will be held in the county in which the client resides or in a mutually agreeable location. A copy of the Right of Appeal for clients is enclosed as is the policy on administrative reviews and fair hearings.

Sincerely,

/s/ Bill Gannon

BILL GANNON

Assistant Director

WEG:na

Encl.

cc: Larry Witters

Clarence Hall

Ken Hopkins, Director

WASHINGTON STATE COMMISSION FOR THE BLIND POLICY

VOCATIONAL REHABILITATION SERVICES FOR INDIVIDUALS—VOCATIONAL AND OTHER TRAINING SERVICES, INCLUDING PERSONAL AND VOCATIONAL ADJUSTMENT, BOOKS, TOOLS AND OTHER TRAINING MATERIALS

1. Personal adjustment services: The Commission will operate and maintain an Orientation Center for the adult blind of the State for those persons for whom it is determined that the Orientation Center is the most suitable resource for prevocational or adjustment training. The primary focus of this Center will be to develop proper attitudes about blindness in the student. Hand-in-hand with this emphasis will be training in such skill areas as the long cane method of travel, braille, typing, home economics, industrial arts, sewing and abacus. Essential to the student's development will be an understanding of the social attitudes about blindness and awareness of how to cope with problems which will arise by reason of the negative social attitudes about blind individuals.

Alternative training in the areas described above is also available through the Commission's rehabilitation teacher service for those persons who do not attend the Orientation Center.

2. Vocational training: The Commission will provide, assist in providing, or cause to be provided such vocational training for each individual as agreed upon by the client AND counselor with supervisory approval as necessary in order to achieve optimum vocational success. Vocational training includes academic, vocational, or technical pursuits, and on-the-job training in the areas of public and private employment. Training or training services in institutions of higher education (universities, colleges, community/junior colleges) shall not be paid for

with rehabilitation funds unless maximum efforts have been made by the Commission to secure student assistance in whole or in part from other sources to pay for such training or training services. The use of similar benefits in institutions of higher learning is mandated by federal rules and regulations governing the Rehabilitation Act of 1973, as amended, (section 1361.45(b)).

3. Books, tools, and other training materials: When necessary during the course of vocational training, the Commission will provide, assist in providing, or cause to be provided books, tools and other training materials. Again, specific items to be provided shall be agreed upon in joint planning between the counselor AND the client with supervisory approval. The amount and type of materials required will, of course, be dependent upon the course of study which is being pursued, but may include tape recorders, tapes, typewriters, braillewriters, and other specialized aids and devices *essential* to successful performance.

4. Private institutions or out-of-state institutions: The Washington State constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas.

Individuals may attend private institutions or out-of-state institutions of higher learning in pursuit of a vocational goal; however, the financial assistance available to any such individual is limited by that amount available to the same individual if education were pursued in a public institution within the state unless the private institution or out-of-state institution provides the only access to the achievement of the individual's vocational goal.

5. Graduate study: The Commission for the Blind will provide, assist in providing, or cause to be provided financial assistance in pursuit of post-graduate degrees when

such degree is clearly necessary to achieve employment in a given field, i.e., veterinary science. However, graduate programs to enhance employment opportunity or to achieve upward mobility within an employment setting could be pursued in the same manner as by the general public. The Commission will, of course, assist the individual in seeking out similar benefits should she/he desire to pursue a program in graduate study.

4/79 (replaces 5/78)

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OFFICE OF HEARINGS

In Re: LARRY WITTERS, *Appellant*.

Docket No. 0480A-237

PETITIONER'S PROPOSED FACTUAL STIPULATION

Larry Witters is medically eligible for Commission for the Blind vocational rehabilitation funding. He is attending Inland Empire School of the Bible in pursuit of a career goal to become a pastor, missionary or Christian educator.

His classwork consists of classes instructional in nature for which he pays tuition. There are also devotional chapel services at the school for which he pays nothing.

At an earlier informal administrative hearing, the Deputy Director for the Commission admitted that its policy was such that the State would pay for Larry Witters training if he wanted to be a Communist agitator if there was a job available after such training, but that payments to train him to be a pastor were illegal.

DATED: Aug. 21, 1980.

Presented by: Moral Majority of Washington
Legal Foundation

By: /s/ Michael P. Farris
MICHAEL P. FARRIS
General Counsel

Approved: /s/ Ernest Furnia
ERNEST FURNIA
Assistant Attorney General
Department of Social Health Services

FILED 82 MAY 26 — A 8:32

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

NO. 80-2-04706-4

LARRY WITTERS, *Plaintiff*,

v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND, *Defendant*.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS CAUSE coming on regularly for hearing before this court on December 11, 1981, plaintiff being represented by his attorney, MICHAEL P. FARRIS, the defendant appearing by and through its attorneys, KENNETH O. EIKENBERRY, Attorney General, and ERNEST M. FURNIA, Assistant Attorney General, and the court having heard and considered the evidence of and on behalf of the parties and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1) That plaintiff Larry Witters has met and does meet the medical and physical eligibility requirements specified under Chapter 74.16 of RCW for status as a legally blind person qualifying him to receive educational assistance.

2) That the program by the Commission for the Blind is publicly funded by a combination of approximately 80% federal funds and 20% state funds.

3) That plaintiff Witters was, at the time of the original hearing, enrolled as a student in the Inland Empire Bible School in Spokane, Washington.

4) That the Inland Empire Bible School is a private institution supported by private donations and tuition payments by students who attend that particular institution and is managed by a Board of Directors.

5) That the Inland Empire Bible School provides a Christian Education on a nondenominational basis offering a one-year Bible certificate, a three-year Bible diploma and a four-year Bachelor of Arts Degree.

6) That plaintiff Witters was originally pursuing a three-year Bible diploma course of study in order to equip himself for a position as a pastor, missionary or youth director, and is presently participating in the four-year program for the same vocational purpose.

7) That the curriculum for such a course of pastoral study included old and new testament studies, ethics, speech, and church administration.

8) That a policy statement for the Washington State Commission for the Blind established by the Commission states: "Private institutions or out-of-state institutions: The Washington State Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas."

9) That plaintiff Witters was denied Vocational Rehabilitation funds by the Washington State Commission for the Blind upon grounds for disqualification found in said policy statement which deals solely with career choice or vocational objective.

From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1) That the objective and purpose of RCW 74.16 is to create the Commission for the Blind as a Washington

State Commission and that RCW 74.16.181(3) specifically allows said Commission to provide for special education or training in business, professions or trade and to provide the payment of certain funds for such.

2) That RCW 74.16.450 empowers this Commission, through the director, to serve as the sole agency of the state in preparing, adopting and certifying state plans, rules, and regulations for the blind and visually handicapped as set forth in this chapter and to seek federal funds for the same.

3) That Article IX, Section 4, and Article 1, Section 11, of the Washington State Constitution direct that no public funds be used or maintained to support any school which is under sectarian control or influence and that school systems are to be maintained free from sectarian control.

4) That the Washington State Supreme Court in issues dealing with religion and religious affiliation has determined that public funds are not to become involved in the practice of religion or the fostering of religious education.

5) That the Commission has the right, under its authority to make rules, regulations and plans to consider certain constitutional and statutory inhibitions in the application of its funding powers.

6) That the policy established by the Commission, of not providing public funds for a degree in theology or related areas is applied and enforced uniformly to the particular relevant group of people, the visually handicapped, and thus there is no denial of equal protection to that restricted group.

7) That the Commission was correct in the application of its funding powers in determining that the use of public

funds, directly or indirectly, may not be provided to assist plaintiff in the pursuit of this specific course of study, career or degree in theology or related areas.

DONE IN OPEN COURT this 26th day of May, 1982.

/s/ Marcus M. Kelly, Judge
MARCUS M. KELLY

Presented by:

/s/ Michael P. Farris
MICHAEL P. FARRIS
Attorney for Plaintiff

Approved as to Form and
Presentation Waived:

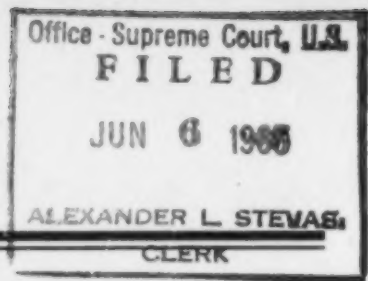
/s/ David R. Minikel
DAVID R. MINIKEL
Assistant Attorney General
Attorney for Defendant

THE FOREGOING INSTRUMENT IS A CORRECT
COPY OF THE ORIGINAL AS THE SAME APPEARS
OF RECORD. ATTEST MAY 26TH, 1982

THOMAS R. FALLQUIST
County Clerk and Clerk of
the Superior Court in and
for the County of Spokane
State of Washington.

BY /s/ Manby J. Fligh
MANBY J. FLIGH, DEPUTY

(K)
No. 84-1070



IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,
Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Washington

BRIEF FOR PETITIONER

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55 Pp

QUESTIONS PRESENTED

A blind student who was medically eligible for vocational rehabilitation funds was denied assistance by the Washington State Commission for the Blind on the sole ground that his vocational objective was to be a pastor, missionary, or Christian education director.

1. Does the Establishment Clause of the First Amendment prohibit a blind student who is studying for the ministry from participation in a federal and state funded vocational rehabilitation program for which he is statutorily and medically eligible?

2. Did the Supreme Court of Washington State err by applying the "tripartite" Establishment Clause test to a single, blind student rather than examining the entire statutory program?

3. Did the Department for Blind violate the Free Exercise Clause of the First Amendment by denying participation in a vocational rehabilitation program to a blind student for the sole reason that his vocational objective was to be a minister, missionary, or Christian education director?

PARTIES

All parties are listed in the caption.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1070

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
 DEPARTMENT OF SERVICES FOR THE BLIND,
Respondent.

On Writ Of Certiorari To The
 Supreme Court Of The State Of Washington

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 102 Wn. 2d 625, 689 P.2d 53 (1984). The oral opinion of the Superior Court of Spokane County, Washington, the Honorable Marcus M. Kelly, made on December 11, 1981, was included in the Petition for Certiorari as Appendix D.¹ It is unreported. The Findings of

¹ References to the opinions below contained in the Petition for Certiorari in Appendixes A-F are cited as C.P. A-1, etc. References to the Joint Appendix are cited as J.A. at _____, etc.

Fact and Conclusions of Law entered on May 26, 1982, in said Superior Court appear in the Joint Appendix at 7.

Two unreported written decisions were entered by the Office of Hearings of the State of Washington, Department of Social and Health Services. The initial decision was entered on October 28, 1980 by Paul B. Hutton, Hearings Examiner. This decision is attached as Appendix F to the Petition for Certiorari. This decision was affirmed on administrative review on December 3, 1980 by Monty Foster, Review Examiner. This decision is attached as Appendix E to the Petition for Certiorari.

JURISDICTION

This case was decided and judgment was entered by the Supreme Court of the State of Washington on October 4, 1984. The jurisdiction of this Court is invoked under Title 28 of the United States Code Sec. 1257(3). The Petition for Certiorari was filed on January 2, 1985, within the 90 days provided by Supreme Court Rule 12.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

U.S. Constitution, Amendment XIV:

" . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Code of Washington 74.16.181:

"The commission may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. Services provided for under this section may be furnished to clients from other agencies of this or other states for a fee which shall not be less than the actual costs of such services. Under such program the commission may: . . .

(3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, and if the same cannot be obtained within the state, provisions shall be made for such purposes outside of the state. Living maintenance during the period of such education and/or training within or without the state may be furnished."

STATEMENT OF THE CASE

Larry Witters is a young blind man who, at the time this case began, was studying to become a pastor, missionary, or Christian youth director. J.A. 7-8. He was enrolled as a student at Inland Empire School of the Bible in Spokane, Washington J.A. 7.

Inland Empire is a non-denominational Christian school offering a one-year bible certificate, a three-year Bible diploma, and a four-year Bachelor of Arts Degree. J.A. 8. It is a private institution supported by donations and tuition payments and is managed by a board of directors. J.A. 8. At the time he originally applied for aid, Witters was enrolled in the three-year program. But at the time of the Superior Court hearing he had switched to the four-year Bachelor of Arts Program.² J.A. 8. The

² The State Supreme Court correctly points out in its opinion that Witters' four-year program was in joint participation with Whitworth

curriculum for his course of study to become a pastor included Old and New Testament studies, ethics, speech, and church administration. J.A. 8.

Witters met the medical and physical eligibility requirements of R.C.W. Chap. 74.16 for status as a legally blind person qualifying him to receive educational assistance from the State Commission for the Blind.³ J.A. 7. Witters applied to the Department for the Blind to participate in a vocational rehabilitation program which it administered. The program is funded by approximately 80 percent federal funds and 20 percent state funds. J.A. 7.

Witters' application for participation was denied for the sole reason that his vocational objective was to become a minister. J.A. 8.

The Department for the Blind adopted a policy statement which provided, in part:

Private institutions or out of state institutions: The Washington Constitution forbids the use of public

College. C.P. A-3. Whitworth is a private Presbyterian college also in Spokane. The Department for the Blind complains in its Brief in Opposition to the Petition for Certiorari that Whitworth's participation in the program was not a part of the Findings of Fact and thus "not a part of the record below." Brief in Opposition 2. However, the Department did not object when Whitworth's participation was indicated in the briefs in the State Supreme Court. See Brief of Appellant 2. Thus, the State Supreme Court adopted this fact in its decision. In any event, Petitioner sees no constitutional significance to this alleged "dispute" of facts. Both schools are private religious colleges and Witters was pursuing the same religious vocational objective.

³ The Commission's name has been subsequently changed to "State of Washington, Department of Services for the Blind." Hereinafter we will refer to this agency as the "Department for the Blind."

funds to assist an individual in the pursuit of a career or degree in theology or related areas.

J.A. 4.

The Department for the Blind viewed Witters' desired career as a pastor as falling within the "related areas" to a degree in theology.

The policy does not prohibit attendance at religious schools, so long as the student is studying for a career other than the ministry. J.A. 4. The sole reason for the disqualification of Larry Witters was his goal to be a minister. The fact that his college was religious in nature was not considered in disqualifying him.

An administrative review of the Commission's decision resulted in a reaffirmation of the initial denial of assistance. This decision was affirmed by the initial hearings examiner in the administrative process on October 28, 1980. This examiner acknowledged that Witters raised federal constitutional questions in written memorandum but "dismiss[ed] Appellant's U.S. Constitutional arguments since he does not have the authority or jurisdiction to hear and decide such cases." C.P. F-6.

Upon internal administrative review, the review examiner gave more consideration, but once again rejected Witters' federal constitutional claims which had been raised in the written memorandum of authorities. The review examiner noted:

The Appellant finally urges that even if the state constitution is construed to deny aid, such denial violates the 14th Amendment and it also violates the First Amendment's guarantee of free exercise of religion. The Appellant's arguments concerning the 14th Amendment of the United States Constitution are discussed above [C.P. E-4] and will not be further

discussed here. The First Amendment to the United States Constitution guarantees free exercise of religion. It does not require that the state subsidize religious study.

C.P. E-7-8.

An appeal was taken to the Spokane County Superior Court pursuant to the Washington Administrative Procedure Act. R.C.W. 34.04. The Superior Court upheld the Department's denial of funds based upon the provisions of the Washington State Constitution which prohibit aid to religious schools. J.A. 9-10.

Witters again raised free exercise and equal protection claims under the United States Constitution in the Superior Court by way of trial brief and oral argument. The Superior Court rejected, albeit somewhat reluctantly, Petitioner's federal constitutional arguments. The trial judge said:

Mr. Farris, you have raised some intriguing arguments that have given this Court fits, for want of a better term. The area that gives me the most concern in this case, is I do not see any conflict here between what is done here and either the First Amendment of the United States Constitution, the Establishment Clause, the practice [free exercise] clause. The area that gives me concern is the equal protection. That gives this Court some concern.

C.P. D-31-32.

An appeal was taken to the Washington State Court of Appeals, which then certified the issue to the State Supreme Court because of the importance of the issues.

At both the trial court level and on appeal, the Petitioner took the position that the State Constitution, properly construed, did not prohibit his participation in this program, but if the State Constitution did mandate his

exclusion, the State Constitution was in violation of the Federal Constitution's Free Exercise and Equal Protection Clauses.

Faced with federal constitutional challenges to the State Constitutional provisions, on October 4, 1984, the Washington State Supreme Court ruled, by a seven-to-two vote, that the Establishment Clause of the First Amendment of the United States Constitution prohibited aid to Larry Witters because he wanted to be trained to be a minister. Because of this ruling, the State Supreme Court did not reach a decision on the state constitutional issues.

The Washington Court focused on the "second prong" of the Establishment Clause test and ruled that permitting Larry Witters to participate in this vocational rehabilitation program would have the "primary effect" of advancing religion since his goal was to be a minister.

The majority considered and rejected Witters' free exercise and equal protection arguments in light of its ruling that the Establishment Clause prohibited government aid for his studies. "We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution." C.P. A-16. "This precludes any need to determine whether the denial of aid on state constitutional grounds would violate the equal protection clause of the Fourteenth Amendment." C.P. A-17.

In effect, the Department for the Blind has taken the position that its own statute is unconstitutional as applied to Larry Witters. Petitioner has taken the position throughout the proceeding that the funding program which is open to all medically eligible persons is constitutional, but to deny him aid violates both the Free Exercise

and Equal Protection Clauses of the United States Constitution.

SUMMARY OF ARGUMENT

For a statute to survive a challenge under the Establishment Clause of the First Amendment this Court has required a three-part showing: (1) the statutory program must have a secular purpose, (2) the principal or primary effect of the program must neither advance nor inhibit religion, and (3) the aid must not foster excessive government entanglement with religion. In this case, the second portion of this test is in dispute.

The Department for the Blind has taken the position that its own statute is unconstitutional as applied to Larry Witters. The Washington Supreme Court found that the source of this "unconstitutionality" was that the primary effect of permitting Witters to participate in the program of vocational rehabilitation advanced religion and thus violated the Establishment Clause.

This analysis is in error. The primary effect of a program which neutrally provides public assistance benefits to all blind citizens does not advance religion. Even if a ministerial student participates in the program, the primary effect of the program remains the same—it helps blind people obtain training and find employment.

This Court has consistently ruled that programs of financial aid which merely allow students who are receiving a religious education to participate on an equal basis with all other students does not have the primary effect of advancing religion. The aid is for the benefit of students, not religious institutions.

The central error of the state court was its focus solely on Witters' training as a minister to judge the primary

effect of this program. To properly judge whether the program has the primary effect of advancing religion, the program as a whole must be examined. When it is so examined, it becomes obvious that its primary effect is to aid blind people vocationally. Any effect upon religion is incidental.

The idea of excluding ministers or ministerial students from participation in a neutral government program is contrary to the intent of the Framers of the First Amendment. James Madison and Thomas Jefferson clearly advocated that ministers should be treated by the government on an equal basis with doctors, lawyers and other professions.

Denying Witters' participation also is contrary to the long standing practice of the United States Congress to permit veterans to use their G.I. Bill benefits to study for the ministry. If the State Supreme Court is not reversed, this aspect of the G.I. Bill will be implicitly ruled unconstitutional since the programs are indistinguishable for Establishment Clause purposes.

While the Establishment Clause does not require disparate treatment of a blind ministerial student because of his religious vocational choice, the Free Exercise Clause forbids it. Witters has been singled out for an exception to the general rule of participation solely because he has chosen a religious career.

He is not asking for a special exception to a general rule because of his religion. Nor is he asking for government funding when the state legislature has not seen fit to grant it. He asks only for equal treatment according to the terms of the state statute. Since his only disqualifying factor is his religious career choice, the Free Exercise Clause demands that he receive the equality of treatment he seeks.

ARGUMENT

I

PARTICIPATION BY A BLIND MINISTERIAL STUDENT IN
A NEUTRAL PROGRAM OF VOCATIONAL
REHABILITATION WHICH IS OPEN TO ALL DOES NOT
VIOLATE THE ESTABLISHMENT CLAUSE

This Court is once again confronted with an agency of state government which seeks to insure the "separation of church and state" with such zeal that the right of equal participation by religious citizens has been trampled in the process. Just as the state university in *Widmar v. Vincent*, 454 U.S. 263 (1981), and the Tennessee Constitution, in *McDaniel v. Paty*, 435 U.S. 618 (1978), sought to prohibit participation by religious persons, the Washington Department for the Blind seeks to deny to Larry Witters benefits which are generally available to all citizens⁴ because his career goal is "too religious."

This case, like *Widmar* and *McDaniel*, involves the interplay between the Establishment Clause and the Free Exercise Clause⁵ of the First Amendment. However, before the proper harmony between the two Religion Clauses can be found, each requires separate analysis. We turn first to the Establishment Clause.

Establishment Clause cases are generally analyzed under three criteria: (1) the statutory program must have a secular purpose, (2) the principal or primary effect of the programs must neither advance nor inhibit religion, and

⁴ Provided, of course, that they meet the medical criteria of visual impairment.

⁵ Both Clauses have, of course, become applicable to the states by virtue of this Court's decisions interpreting the Fourteenth Amendment Due Process Clause. See, e.g., *Cantwell v. Connecticut*, 309 U.S. 626 (1940).

(3) the aid must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

We discuss the first and third parts of this test initially, because there is little dispute concerning the issues of "secular purpose" or "excessive entanglement."

The statutory purpose is set forth in R.C.W. 74.16.181:

The commission [for the blind] may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and selfcare.

The Washington Supreme Court had no trouble in finding that said legislative purpose was constitutionally permissible.

The state clearly has an interest in assisting the visually handicapped. We need only look to the above quoted statement of purpose found in RCW 74.16.181 to hold that this statute has a valid secular legislative purpose.

102 Wn. 2d, at 628, 689 P.2d, at 56.

We anticipate no dispute on this point by the Department for the Blind. Helping blind people with vocational training is a legislative purpose which is both commendable and clearly secular.

There is absolutely no evidence in the record that permitting Larry Witters to participate in the vocational rehabilitation program would foster *any* entanglement between church and state, much less an excessive entanglement which would render his participation unconstitutional. The Washington Supreme Court said:

The case before us is much different. This case involves one person's effort to get financial assistance

for his theological training. The three-pronged "entanglement" inquiry is ill-suited to this case. In addition, the administrative and trial court records do not provide an adequate factual basis to make the type of inquiry contemplated by the Supreme Court.

102 Wn. 2d, 630, 689 P.2d, at 57.

The factor upon which this case turns is the second portion of the tripartite test, *to wit*: whether the program has the "primary effect" of aiding or inhibiting religion.

This Court has consistently held that programs which aid students do not have the primary effect of advancing religion, while programs which aid religious institutions oftentimes do.⁶ Therefore, to determine the "primary effect" in this case, this Court must decide if this program primarily aids blind students or whether it primarily aids religious institutions.⁷

The Washington Supreme Court held that the "primary effect" test of Establishment Clause would be violated if Witters were permitted to participate in the state-admin-

⁶ Even aid to religious institutions is not unconstitutional *per se*. If the aid to the institution is segregated to its secular functions only, this Court has often found such aid to be permissible under the Establishment Clause. See, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

⁷ Even if this case were found to constitute aid to institutions, rather than direct aid to students, the issue would still remain whether this program had the *primary* effect of aiding religious institutions. This Court has rejected any notion that incidental aid to religious institutions violates the Establishment Clause. "One fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 393 (1983).

istered program of vocational rehabilitation for the blind. The sole factor leading to this conclusion was that his career objective is to be a pastor, missionary, or Christian youth worker.

We would submit that this conclusion erroneously construes the Establishment Clause in several respects: (1) The state court improperly treated the case as if it involved direct aid to a religious institution; (2) The state court improperly focused on Witters' participation rather than the statutory program as a whole to judge whether the "primary effect" was to advance religion; and (3) The state court ignored the intent of the Framers of the First Amendment and the lessons of history in denying Witters' right of participation.

A

Ministerial Students Are Not Precluded From "Receiving The Benefits of Public Welfare Legislation" By Virtue Of The Establishment Clause

In 1973, this Court observed that "[m]ost of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772 (1973). This case falls into that general trend. The Court, however, noted that there were generally two types of religion-education cases: "those dealing with religious activities in the public schools, and those involving public aid in varying forms to sectarian institutions." *Id.*

Although this case clearly does not fall into the former category, it is erroneous to conclude that it falls into the latter. Cases which have been decided by this Court "involving aid in varying forms to sectarian institutions" usually look quite different from the situation presented

by the case at bar. The "state aid to religious institution" cases are usually the result of what the Court in *Nyquist* termed "ingenious plans for channeling state aid to sectarian schools." 413 U.S., at 785.

When the Washington legislature enacted its program of aid to blind students, although it did not exclude students in religious schools or those studying for religious careers, it was clearly a program that was without the type of "ingenuity" the Court referred to in *Nyquist*. The Washington program was designed purely and simply to aid blind people. No one has dared to suggest that the Washington legislature was looking for a way to maneuver around the various decisions of this Court in order to channel some state funds to religious institutions.

1. **This Is A Neutral Program Of Student Aid Broadly Available To All Blind Persons.**

It would appear that a third class of Establishment Clause cases has arisen. They are succinctly identified by this Court's recent observation in *Mueller v. Allen*, 463 U.S. 388, 398-399 (1983):

As *Widmar* and our other decisions indicate, a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We would submit that the statutory program for vocational rehabilitation for blind people in the State of Washington, which includes all classes of students, those in public and private schools, those in secular and sectarian schools, and those with secular and religious career objectives, is such a program.

The decision by the Supreme Court of Washington is wholly reliant upon principles and "sweeping utterances" *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970), from

the line of cases involving aid to religious institutions. A far different result is reached when the correct line of authority is applied. This Court has consistently upheld the right of religious individuals to participate in neutral programs in the face of Establishment Clause challenges.

Any analysis of the distinction between aid to religious institutions and the right of religious persons to participate in programs open to the public at large must begin with *Everson v. Board of Education*, 330 U.S. 1 (1947). In that case this Court upheld the constitutionality of a New Jersey statute which permitted "tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." 330 U.S., at 17. This Court held that the Establishment Clause did not forbid students who were receiving a religious education from participating in these kind of public programs. In what has become a well-used series of examples of permissible "aid to religion," this Court reasoned that allowing students to ride buses at taxpayers' expense was no more violative of the Establishment Clause than providing "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks" 330 U.S., at 17-18, for religious schools and institutions. The Court reasoned that the State of New Jersey "**cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, because of their faith, or the lack of it, from receiving the benefits of public welfare legislation.**" 330 U.S., at 16. (Italics in original, bold print added for emphasis).

Like the students in *Everson*, Witters is receiving a religious education. Aid to the blind for vocational rehabilitation is precisely the kind of public welfare legis-

lation which the language of *Everson* authorized. In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court clearly indicated that this principle of the right of equal participation declared in *Everson* was to be broadly construed. In discussing *Everson*, the Court said: "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation . . ." 392 U.S., at 242. (Emphasis added).

In *Board of Ed. v. Allen*, this Court permitted the loan of textbooks to all students of the state without regard to their enrollment in public, private, or religious school. But it is clear from the language of the Court in both *Everson* and *Board of Ed. v. Allen*, that this principle is not limited to police and fire protection, sewers, sidewalks, transportation, textbooks, or public welfare legislation. The principle that the Establishment Clause does not prevent a state from allowing religious citizens from participating equally⁸ in its programs is a principle which extends to all "state laws." 392 U.S., at 242.

Although this Court recognized in both *Everson* and *Board of Ed. v. Allen* that there was incidental benefit to religious schools,⁹ the program in each case was held to be one where "the financial benefit is to parents and children, not to schools." *Board of Ed. v. Allen*, 392 U.S., at 244. When the reverse is true, this Court's general rule has been:

⁸ We discuss in Section II, the requirements of the Free Exercise Clause which demands equal treatment of religious persons. For Establishment Clause purposes it is sufficient to demonstrate that equal treatment is not prohibited.

⁹ *Everson*, 330 U.S., at 17; *Board of Ed. v. Allen*, 392 U.S., at 244.

Thus, the schools, rather than the children, truly are the recipients of the service and, as this court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid.

Wolman v. Walter, 433 U.S. 229 (1977).

In a variety of other religion-and-education cases, this Court has consistently followed the principle of approving aid to students while disapproving most direct aid to religious institutions. The Court has upheld the constitutionality of programs if, in the Court's judgment, the true effect of the laws is to aid parents and students as opposed to "ingenious plans for channeling state aid to sectarian schools." *Committee for Public Education v. Nyquist*, *supra*, 413 U.S., at 772. Thus in *Meek v. Pittenger*, 421 U.S. 349 (1975), this Court upheld the constitutionality of Pennsylvania's textbook loan program on the grounds that it constituted a "financial benefit . . . to parents and children, not to the nonpublic schools." 421 U.S., at 361. But at the same time in *Meek*, the Court ruled that loans of instructional materials and the provision of "auxiliary services" violated the Establishment Clause because those portions of the program were direct aid to the religious institutions. 421 U.S., at 369. See also, *Wolman v. Walter*, *supra*; *Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

Even if the form of the aid appears to be directed toward students or parents, this Court has held such aid to violate the Establishment Clause if "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian schools." *Committee for Public Education v. Nyquist*, *supra*, 413 U.S., at 783.

The principles set forth in *Mueller v. Allen*, *supra*, are, we would submit, especially applicable to this case. In

Mueller, this Court sustained the constitutionality of a Minnesota program which permitted income tax deductions for special tuition and related school expenses. Although the tax deduction had special practical significance to those whose children attended private and parochial schools, the deduction was available to all parents including those with children in the public school. The Court said that programs which "neutrally provide state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." 463 U.S., at 398-399.

The Court identified factors which help to determine whether an aid program is truly for the benefit of students and parents, or whether, as in *Nyquist*, the aid to parents is a ruse. First, in *Mueller*, the Court noted that "under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children." 463 U.S., at 399. Second, the Court said: "Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no 'imprimatur of state approval,' *Widmar, supra*, at 274, can be deemed to have been conferred on any particular religion or on religion generally." *Id.*

The only reason any state funds would flow directly or indirectly to Inland Empire School of the Bible or Whitworth College is the result of "numerous, private choices" made by Larry Witters. First of all, Witters was required to choose to become trained for a vocation. He could have chosen to sit idly without training and without work because of his visual handicap. Second, Witters made the private choice to study for the ministry. And finally, Witters had to choose to enroll in the particular program which the two schools provided.

Neither the state nor the religious schools played any role in his decisions. This case seems much "cleaner" in this regard than some of the other programs this Court has found to be constitutionally permissible. For example, in *Meek v. Pittenger, supra*, this Court permitted loans of textbooks to students in religious schools. The method in which the books were chosen required, as a practical matter, some influence and participation by the religious school. The student made his "request" to the nonpublic school. The school in turn "summarized" the requests and forwarded them to the state agency. 421 U.S., at 361. One could safely assume that in a nonpublic high school history course, for example, it would be desirable for all of the students to use the same textbook. Either the school exerted some influence on the choice, or the students showed unanimity of thought which is uncharacteristic of most teenagers.

No one but Witters was involved in his series of choices to study for the ministry. It takes an active imagination to suggest that the "imprimatur of State approval" abides on Witters' decision when in *Meek*, no such imprimatur was found.

Blind students may choose to go to public or private colleges. They may choose between sectarian and nonsectarian schools. They may choose secular occupations, and insofar as the State legislature was concerned, they could choose a religious occupation. They may choose to become a teacher. Once becoming a teacher, they may choose to be employed in a variety of schools—one that is pervasively religious, one which has a religious foundation but is essentially secular, one that is a private secular school, or they may teach in a public school.

The Department for the Blind has no means of preventing one who is trained in a secular field from turning that training into a religious career. In addition to teachers, one could major in a foreign language and could choose a religious career as a Bible translator for a mission society. Or such a student could choose a secular career and work at the United Nations as a translator. A blind student could major in social work and go to work for a group like the Union Gospel Mission, and do missionary work among the nation's poor. The same student could make a secular choice and become employed by a government agency. A person could be trained as an airplane mechanic and work for a mission society like Missionary Aviation Fellowship or the student could choose a secular use of his or her training by working for one of the nation's commercial airlines.

The choices as to which school to attend and which career to pursue are entirely up to the blind individual. No agency of the state has the power to influence the choice. Neither does any agency of religion have the power under the program to influence which choices students make.

Since it is clear that the program of aid to the blind is one where individuals receiving a religious education "receive the benefit of public welfare legislation," *Eversen*, 330 U.S., at 16, on an equal basis with all other citizens, the Department for the Blind's decision to disallow Witters' participation in the name of "separation of church and state" was clearly not required by the Establishment Clause. This Court's decisions are without exception. If the program is available to all, it is not unconstitutional to permit those who receive a religious education to participate on an equal basis with all other citizens.

2. The Washington Supreme Court Misapplied "Sweeping Utterances" From Two Aid-To-Religious-Institution Cases.

The decision of the Washington court was founded not on a logical analysis of the *principles* of this court's decisions in Establishment Clause cases, rather, it lifted a single phrase from each of two cases involving institutional aid to religious schools and applied the phrases in an inappropriate manner.

This Court has itself made a rather forthright observation of the danger in taking quotations from its decisions and stretching their application beyond what was originally before the Court. In *Walz v. Tax Commission*, *supra*, 397 U.S., at 668, this Court stated:

The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

What the Washington court did was to take "sweeping utterances" from two aid-to-institutions cases and treat them as general principles when in fact they should not be so applied. First, the state court relied upon language from *Hunt v. McNair*, *supra*, which said that state aid was impermissible "when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S., at 734. The second phrase comes from *Roemer v. Board of Public Works*, *supra*. In that case this Court said: "The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious alike." 426 U.S., at 747. Both *Hunt* and *Roemer* involved state aid which was

made directly available to religious colleges. The constitutionality of the aid was sustained in both cases.

These "sweeping utterances" cannot be reconciled with many of this Court's decisions unless they are understood to apply only to cases involving aid to religious institutions. The meetings by the religious group in *Widmar v. Vincent*, *supra*, could be appropriately characterized as "a specifically religious activity in an otherwise substantially secular setting." However, this Court found that the religious student group had the right to engage in such specific religious activity because the secular setting had been opened to all. Also, there was no finding by the Court in *Everson*, that the parochial schools were not providing "what is actually a religious education." In fact just the opposite is true, the Court said, "[t]hese church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith." 330 U.S., at 3. New Jersey was unquestionably funding one aspect of "a religious education," yet this Court upheld the aid.

Widmar and *Everson* were not decided in error. Rather the Washington Court applied the language from *Hunt* and *Roemer* in error. These cases, which supplied the "magic phrases" used by the lower court, were not addressing the issue of aid to a general class of students, some of whom received a religious education. Their language should not be stretched beyond the institutional aid situation.

In the cases where the Court has permitted direct aid to religious institutions, it has required that there be a clear demarcation between the secular functions and the

religious functions in order to permit the aid.¹⁰ If the school is actually being funded to perform a "specifically religious activity in an otherwise substantially secular setting," it is not permitted. Likewise, if the school uses its state funds to provide a religious education, then direct aid is impermissible. Even the mere possibility that state aid could be diverted for such purposes is sufficient to invalidate the program.¹¹

But there is not a single decision of this Court which has denied equal participation in a neutral government program to a person receiving a religious education. If these phrases were actually generally applicable rules of constitutional law, then this Court has "overruled" them when it said in *Mueller*, "a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." 463 U.S., at 398-399.

Numerous decisions of this Court become inexplicable if these phrases from *Hunt* and *Roemer* are given the talisman-like effect employed by the Washington court. *Widmar*, *McDaniel*, *Mueller*, and *Everson*, just to name a few, cannot be reconciled if these phrases are principles of constitutional law applicable outside the aid-to-religious-institution cases.

3. Two Decisions On The Merits By This Court Directly Contradict The Establishment Clause Decision By The Washington Court.

The presupposition of the Washington Supreme Court was that Witters was receiving an education that was so

¹⁰ See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Hunt v. McNair*, 413 U.S. 734, 744 (1973).

¹¹ See, e.g., *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973).

religious that the Establishment Clause was violated by his participation, even though the program itself was neutral.

This Court has directly rejected this line of reasoning twice in summary dispositions, which are given the effect of decisions on the merits.

In the case of *Durham v. McCloud*, 259 S.C. 409, 192 S.E.2d 202 (1972), the Supreme Court of South Carolina was faced with an Establishment Clause challenge to a state guaranteed student loan program. Students could get state guaranteed loans to "to defray their expenses at any institution of higher learning." 192 S.E.2d, at 203. "No restriction [was] placed upon the course of study undertaken by a borrower." *Id.* Thus, the program was just like the aid to the blind program in Washington state insofar as the eligibility of those attending sectarian schools, including those who were studying for the ministry. In discussing the Establishment Clause challenge the court said:

We find no merit in this claim. The Act is scrupulously neutral as between religion and irreligion and as between various religions. It simply aids and encourages South Carolina residents in the pursuit of higher education, and leaves all eligible institutions free to compete for their attendance and dollars, neither advantaged or disadvantaged by the operation of the Act. If, on the other hand, sectarian schools had been excluded from the category of eligible institutions, such schools would have been materially disadvantaged by the intervention of the State's loan program.

192 S.E.2d, at 204.

This is, of course, a direct parallel to the program in Washington state. If the South Carolina program can survive a federal Establishment Clause claim, then the

Washington program must be treated in the same manner.

The appeal of this South Carolina case to this Court was dismissed for lack of a substantial federal question. 413 U.S. 902 (1973). Such a dismissal is a decision on the merits entitled to precedential weight as a decision of the United States Supreme Court, *Hicks v. Miranda*, 422 U.S. 332, 343-344 (1975).

The dismissal of the *Durham* case came on the same day, June 25, 1973, as this Court decided *Nyquist, Hunt v. McNair, supra, Sloan v. Lemon*, 413 U.S. 825 (1973), and *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). The timing of the decision adds special significance to a decision that is, by virtue of the precedents of this Court, entitled to precedential weight.

A Tennessee program which also gave secular and religious students an equal opportunity for state assistance was challenged under the Establishment Clause in *Americans United for Separation of Church and State v. Blanton*, 433 F.Supp. 97 (1977). Tennessee gave financial aid to college students "solely on the basis of a student's financial need." 433 F.Supp., at 99. The students were permitted to attend any accredited college in the State. The act specifically stated that "no effort is to be made by state officials . . . to influence a student's selection of institutions." *Id.*

The program was challenged because students were allowed to attend sectarian institutions. The three judge panel rejected the challenge, holding:

In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the

program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions.

In enacting the Tennessee Student Assistance Program, the Tennessee General Assembly sought to provide needy students with the opportunity to attend the higher education institution of their choice, be it public, private, sectarian, or nonsectarian. To ensure that the neutral purpose would not be compromised, the General Assembly enacted a student aid program rather than an institutional aid program. The statute passes the relevant three-pronged inquiry, and the Court finds that the program on its face and in its application, does not offend the values protected by the Establishment Clause.

433 F.Supp., at 104-105.

If the words "blind students" were substituted for the words "needy students" in the above quotation, one would have a ready-made analysis of the Witters case. The only possible argument which could be raised to attempt to show a distinction between *Blanton* and the present case is: "While it is true that in *Blanton*, students could attend sectarian institutions, Witters' education for the ministry is *so religious* as to justify a different rule."

Three points quickly destroy this argument. First, there was nothing in the Tennessee program to prevent students from using their aid to study for the ministry. Second, the Establishment Clause does not recognize distinctions between education that is "a little religious" and education which is "very religious." And third, the record in the *Blanton* case shows that some of the students were using their state aid to obtain education that was "very religious" indeed.

The plaintiffs appealed the decision of the three judge panel to this Court. In their jurisdictional statement,¹² the plaintiffs in *Blanton* describe the record as being "replete with illustrations of the overwhelming sectarianism of the three colleges with respect to which appellants offered evidence." J.S., at 13. Upon reviewing the evidence cited by the *Blanton* appellants, it is apparent that the schools were at least as religious as the program that Witters was pursuing.¹³

Faced with a record which demonstrated that the Tennessee program permitted sectarian schools to train "future leaders of the Church," this Court summarily affirmed the decision of the three judge panel in *Blanton*. 434 U.S. 803 (1977). Just like a dismissal for want of a substantial federal question, a summary affirmance by this Court "was a decision on the merits . . . entitled to precedential weight." *Meek v. Pettinger*, *supra*, 421 U.S.,

¹² No. 77-250.

¹³ The Jurisdictional Statement notes the following:

The "supreme purpose" of David Lipscomb College is to teach the Bible as the revealed word of God. The first object of the college is "[t]o provide the best in Christian liberal arts education under the direction of Christians in a distinctly Christian environment." Other major objectives include "train[ing] future leaders in the church, and hold[ing] up Christ as the example to follow in every field of activity. . . . (Emphasis added.)

...

Chapel attendance is compulsory for both faculty and students and are conducted for worship. Further, every student must take a Bible lesson daily.

...

In response to a question from the trial judge, the President of the College admitted that the college attempts to make the religious influence in the school "pervasive." (Footnotes omitted.)

J.S. (77-250), at 13-15.

at 370, fn. 20. In *Meek*, this Court said that a summary affirmance "directly support[s], if not compell[s]" the same result in another case which raises the same issues that were raised in the case summarily affirmed.

Thus, *Blanton* and *Durham*, stand as powerful and directly applicable precedents, and although the decisions were penned by lower courts, the nature of this Court's disposition of both cases causes them to be direct "if not compell[ing]" support for Petitioner herein.

Furthermore, the principles enunciated in the two "summary disposition" cases are directly supported by the full opinions of this Court in *Nyquist* and *Mueller*. Reading *Nyquist* and *Mueller* together demonstrates that this Court has already considered and rejected the proposition advanced by the Washington Supreme Court. These cases hold that the Establishment Clause is not offended by a state aid program where there is evidence of "the significantly religious character of the statute's beneficiary." *Nyquist*, 413 U.S., at 782, fn. 38.

The Court in *Nyquist* specifically reserved the question of whether an aid program similar to the G.I. Bill would survive an Establishment Clause challenge until a case arose with evidence that such aid was being used by the "statute's beneficiary" who was "significantly religious." *Id.* In *Mueller*, the Court said in the opening paragraph of its decision that it was answering the "question [which] was reserved in *Committee for Public Education v. Nyquist*. . . ." 463 U.S. at 390.

The result in *Mueller*, of course, was to affirm the principle of equal participation in state programs even if the beneficiaries of the state program used their state aid to obtain a religious education. To state the result of these cases in another way, *Nyquist* reserved the question: "If a

recipient of a general state aid program is significantly religious, will that factor create an Establishment Clause violation?" *Mueller* answered: "[A] program . . ., that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." 463 U.S., at 398-399.

Although this Court has never directly decided whether or not a student studying for the ministry can participate in a neutral state program for the blind and not violate the Establishment Clause, the decisions of this Court by way of both summary affirmance and full opinions are unmistakably in Petitioner's favor. His right to participate cannot be denied on the basis of the Establishment Clause of the First Amendment.

B

It Is Improper To Evaluate "The Primary Effect" Of A Program For Aid To Individual Persons By Focusing On A Single Student Who Is Receiving A Religious Education

The only reason that the Washington court found that the primary effect of the program of aid for the blind advanced religion was that the court focused solely on Larry Witters and not the program as a whole to make the evaluation. The constitutionality of the program is readily apparent if the program as a whole is the measure of whether or not it has the "primary effect" of advancing religion.

The Department has failed to develop any evidence that there are numerous blind people who would choose to study for the ministry if Witters prevail. Insofar as the record has been developed, Witters is the only blind person in the history of the State of Washington who has applied for aid for the purpose of studying for the ministry.

It is obvious to all that the program as a whole trains blind people for a wide variety of careers, skills, and occupations. It would be patently ridiculous to suggest that, if judged as whole, the program has the primary effect of advancing religion. The primary effect of this program as a whole is unquestionably secular in nature.

The state court upheld the "secular purpose" of the statute by looking at the program as a whole. But then, it switched to an examination of Witters alone to judge the "primary effect" of the program. This switch was totally improper in this kind of case.

The State court once again took a sentence out of one of this Court's decisions, and misapplied it in a way so as to become another "sweeping utterance." *Walz v. Tax Commission, supra*, 397 U.S., 668. The state court said:

The second part of the *Lemon* test, that the primary effect of the state aid must neither advance nor inhibit religion, requires that we "narrow our focus from the statute as a whole to the only transaction presently before us." *Hunt v. McNair*, 413 U.S. 734, 742 . . . (1973). Rather than look to the face of the rehabilitation statute, which is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought, we focus our attention on the particular aid sought by the appellant.

102 Wn. 2d 628, 689 P.2d, at 56.

This quotation from *Hunt*, we would submit, was never intended by this Court to be an ironclad principle of constitutional analysis, especially in cases involving an individual person. In *Hunt*, this Court made the above-quoted statement in connection with a case involving a religious college construction project with state-backed revenue bonds totalling \$1,250,000. 413 U.S., at 738. This

is a materially different situation than a single individual participating in a neutral program of public welfare legislation. While we do not suggest that dollar amounts alone require a different means of analysis, programs which aid a specific religious institution with over \$1 million in state backed funds naturally suggest some individualized attention.

Even more important than the amount of the funds is the fact that *Hunt* was dealing with aid to an institution. The Court's reasoning and authority for "narrow[ing its] focus from the statute as a whole to the only transaction presently before us" was stated in *Hunt* as follows:

Aid normally may be thought to have a primary effect of advancing religion *when it flows to an institution* in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton v. Richardson, supra*, the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. Mr. Chief Justice Burger, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held that possibility open for future cases:

"Individual projects can be properly evaluated if and when challenges arise with respect to *particular recipients* and some evidence is then presented to show that the *institution* does in fact possess these characteristics." 403 U.S., at 682. (Emphasis added).

413 U.S., at 743.

The Washington court borrowed a phrase from *Hunt*, while studiously ignoring *Hunt's* reasoning and the reasoning from *Tilton* upon which it was founded. In both of those cases this Court was careful to state that "a narrow focus" was to be used in evaluating aid to religious institu-

tions. This Court said nothing about using a narrow focus to judge an individual person participating in a program open to all.

In fact this Court has directly rejected such an approach in *Widmar v. Vincent*, *supra*. In *Widmar*, a student group, Cornerstone, wanted to resume its religiously oriented meetings on the state university campus. The meetings included religious worship. The university argued that the Establishment Clause prohibited it from permitting religious groups to participate in an open forum which it had established for all student groups. This Court unanimously rejected this argument. 454 U.S., at 270-275; Stevens, concurring, *id.*, at 280-281; White, dissenting on other grounds, *id.*, at 282. The University argued that the focus should be on the religious group and whether including it in the limited public forum would have the primary effect of advancing religion. This Court replied:

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. . . . In this context we are unpersuaded that the primary effect of the *public forum*, open to all forms of discourse, would be to advance religion. (Emphasis added).

454 U.S., at 273.

If the language from *Hunt* were really a rule requiring "a narrow focus" on a religious participant, then why did this Court focus on the whole of the public forum in *Widmar*? The obvious answer is that *Hunt* was never intended to create such a "rule."

This Court has consistently looked at the program as a whole whenever it has adjudicated a program where the aid was directed toward individuals rather than religious institutions. See, e.g., *Mueller v. Allen*, *supra*; *Meek v. Pittenger*, *supra*; *Board of Education, v. Allen*, *supra*; *Everson v. Board of Education*, *supra*. There is not a single decision of this Court where the Court has "narrowed its focus" upon a religious individual, and found that because of his religiosity, a neutral program became unconstitutional as applied to him.

In *McDaniel v. Paty*, *supra*, Tennessee had, in a sense, "narrowed its focus" on ministers. In *McDaniel*, the provision in the Tennessee Constitution which prohibited ministers from holding legislative office was challenged on Free Exercise grounds. Just as in the present case, the State defended saying that its rule excluding ministers was justified on the basis of preventing an establishment of religion. This argument was rejected by this Court. 435 U.S., at 628-629.

Mr. Justice Brennan, in his concurrence, found that not only did the act of participation by a minister not offend the Establishment Clause, but that the exclusion of ministers in fact constituted a violation of both the Free Exercise Clause and the Establishment Clause as well. "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here; *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). It may not be used as a sword to justify repression of religion or its adherents from *any aspect of public life*." 435 U.S., at 641 (Emphasis added).

The same result is indicated in the present case. Nothing in the Establishment Clause nor in the precedents of this Court suggests that it is appropriate to

dents of this Court suggests that it is appropriate to "narrowly focus" on Witters and his religious education. When the State selects a ministerial student out for special treatment, not only are there Free Exercise violations, as we argue below, but there is, what could be termed, a "reverse Establishment Clause" violation of the type Mr. Justice Brennan found in *McDaniel*.

The program of aid to the blind must be judged as a whole.¹⁴ Its primary effect is clearly secular as the Supreme Court of Washington itself said: "[T]he rehabilitation statute . . . is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought. . . ." 102 Wn. 2d, at 629, 689 P.2d, at 56.

C

Lessons From History Suggest That Students For The Ministry "Ought Therefore To Possess The Same Rights"

1. Jefferson And Madison: The Founders Favored Equality.

In reaching decisions on the Religion Clauses of the Constitution, this Court has treated the views of our

¹⁴ Even if the focus were placed solely on Larry Witters, there is some doubt that the primary effect of allowing him to study for the ministry under the Department's program would have the primary effect of advancing his religion. He is, presumably, already a committed Christian. His personal faith will not be enhanced. Nor will his sense of "calling" to serve others be enhanced. The spiritual aspect of his calling to the ministry is unaffected by the grant or denial of government benefits.

What has been affected is his ability to take the course of practical training, such a church administration and speech, which enable him to translate his spiritual calling into a job which pays him a salary. The primary effect, even as to Witters, is to simply prepare him for a job which he has chosen. This is clearly secular in nature.

founding fathers as guiding lights which can illuminate an area of law which is fraught with difficulty and controversy.¹⁵ No two individuals have been used in this way with greater reliance than James Madison and Thomas Jefferson. Both Madison and Jefferson were stalwart advocates of the principles which led to the creation of the Establishment Clause. But neither man would, on the basis of their writings, advocate carrying the principle of the "separation of church and state" to the point of denying equality of treatment for one studying for the ministry.

Madison's greatest contribution to the area of religious freedom, other than his direct work on the First Amendment, was his authorship of his famous *Memorial and Remonstrance Against Religious Assessments*. Although the *Memorial* was directed against a specific bill in the Virginia legislature, the various points Madison made have long been regarded as enunciating principles of religious liberty which should be generally applicable in our nation.

The fourth point of Madison's great work declares:

[T]he bill violates that *equality* which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature *equally* free and independent," all men are to be considered as entering into Society on *equal* conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according

¹⁵ See, e.g., *Lynch v. Donnelly*, ____ U.S. ____, 79 L.Ed.2d 604, 611 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

to the dictates of conscience." . . . As the Bill violates *equality* by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. (Emphasis added).

Quoted in full by Mr. Justice Jackson in his dissent in *Everson, supra*, 330 U.S., at 66.

Madison consistently argued for equality as one of the necessary ingredients for religious freedom. As this Court noted in *McDaniel v. Paty, supra*, 435 U.S., at 623-624, Madison opposed a provision which would prohibit ministers from holding public office in Virginia while Thomas Jefferson initially supported the ministerial exclusion. Madison's response was forcefully stated:

"Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate another article of the plan itself which exempts religion from the cognizance of Civil power? does it not violate justice by once taking away a right and prohibiting a compensation for it? does it not in fine violate impartiality by shutting the doors [against] Ministers of one Religion and leaving it open for those of every other." 5 Writings of James Madison 288 (G. Hunt ed. 1904)

Quoted by Mr. Chief Justice Burger in *McDaniel, supra*, 435 U.S., at 624.

The Washington Department for the Blind has "punished a religious profession with the privation of a civil right."¹⁶ Any suggestion that this privation is man-

¹⁶ We are not arguing that there is a "civil right" to have blind people vocationally rehabilitated. The "civil right" here is not the "right" to an education, but the right to equal treatment in a government program. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

dated by the federal Establishment Clause is contrary to the historical arguments of one of the chief authors of that Clause.

Jefferson eventually conceded that Madison had been right. Again, as noted by Mr. Chief Justice Burger in *McDaniel*, 435 U.S., at 623-624, fn.4, Jefferson wrote in 1800 saying:

"[A]fter 17 years of more experience & reflection, I do not approve . . . [of] . . . the incapacitation of a clergyman from being elected. The clergy by getting themselves established by law, & ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man. They are still so in many countries & even in some of these United States. Even in 1783 we doubted the stability of our measures for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretensions to privilege, and to stand on a footing with lawyers, physicians, &c. *They ought therefore to possess the same rights.*" 9 Works of Jefferson 143 (P. Ford ed. 1905). (Emphasis added).

Some 184 years after Jefferson penned these words, the Washington Supreme Court decided that those who desire to be ministers should have fewer rights than those who desire to be "lawyers, physicians, &c."¹⁷

Madison and Jefferson, as key representatives of our tradition of religious freedom, have both articulated the principle of equality of treatment for ministers. Those who study for the ministry certainly should benefit from the principle as well. The Department for the Blind's

¹⁷ The trial judge demonstrated the unequal treatment between these professions when he indicated that he had received part of his training at Gonzaga University School of Law, a Catholic institution, using his benefits under the GI Bill. C.P. D-26.

discriminatory decision to exclude Witters solely on the basis of his intended career cannot be justified in light of this history. In the words of Jefferson, Witters "ought therefore to possess the same rights."

2. Our Nation's Recent History Affirms Witters' Right Of Participation: The G.I. Bill.

In at least one other Establishment Clause case which has come before this Court, the argument has been made that the government "aid to religion" before the Court is indistinguishable from the G.I. Bill.¹⁸ *Committee for Public Education v. Nyquist, supra*, 413 U.S., at 782, fn. 38. The obvious reason for making such an argument is that the G.I. Bill has been so historically accepted that any court decision which would threaten its constitutionality would be seriously questioned. As Mr. Justice Holmes noted, "[a] page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

The decision of the Supreme Court of Washington, unless reversed by this Court, does indeed imperil a significant aspect of the G.I. Bill. If Witters must be excluded from studying for the ministry under the aid to the blind program by virtue of the Establishment Clause, then the same fate awaits those who study for the Ministry under the G.I. Bill. Constitutionally, the programs are indistinguishable.

Since its inception, the G.I. Bill¹⁹ has never contained

¹⁸ 38 U.S.C. §1651.

¹⁹ The G.I. Bill has its roots in the Vocational Rehabilitation Act of 1920, 66th Congress (enacted June 2, 1920). It was amended by Public Law 16, Vocational Rehabilitation Act of 1943. The Servicemen's Readjustment Assistance Act of 1944, P.L. 346 (June 22, 1944) was

an exclusion from participation for those who desire to study for the ministry.²⁰ Today, a multitude of schools are eligible to accept armed forces veterans to train them to become ministers, priests, and rabbis.²¹ Inland Empire School of the Bible is also approved by the Veteran's Administration for students who desire to use their G.I. Bill benefits. It is hard to see a constitutional difference between Witters studying under the aid to the blind program and the student across the aisle studying under the G.I. Bill.

Although this Court has said that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees," *Marsh v. Chambers*, 463

the first act labeled the "G.I. Bill." It was modified after the Korean War, Veterans' Readjustment Assistance Act of 1952, P.L. 550, 82nd Congress. It was amended again in 1966, P.L. 89-358, Veterans' Readjustment Benefit Act of 1966. The most recent revisions were made in P.L. 96-466 (1980) and P.L. 97-295 (1982).

²⁰ Congress has demonstrated that it knows how to create exceptions to the general and broad provisions of the G.I. Bill when it desires to do so. At present, 38 U.S.C. §1673 lists a number of courses which are excluded from the Bill's coverage. These courses include: "any course in bartending or personality development course," sales courses which do not provide specialized training for a specific vocational field, avocational training, and independent study. Study for the ministry is not excluded from the Bill's coverage.

²¹ Included in the list of approved institutions for ministerial or rabbinical studies are: Harvard Divinity School, Catholic University, Jewish Theological Seminary, Reconstruction Rabbinical College, Reformed Theological Seminary, Dallas Theological Seminary, Wesley Theological Seminary, and Western Conservative Baptist Theological Seminary. Also VA approved for rabbinical studies are the following institutions in Israel: Rabbinical Seminary of America, Yeshivas Torah Ore, Yeshivat Hama'ayan, and Yeshivat Moharil Ashlag. Information from Veteran's Administration Career Development Center, 941 N. Capitol St., N.E., Washington, D.C. 20421.

U.S. 783, 790 (1983), the weight of the history of the G.I. Bill is not insignificant.

If the experience of the G.I. Bill permitting veterans to use government benefits ran counter to the stream of the decisions of this Court on the Establishment Clause, its weight alone would not supply the justification for allowing Witters to participate. But it is the Supreme Court of Washington, not the G.I. Bill that is swimming against the tide of the decisions of this Court as well as the flow of history.

II

THE FREE EXERCISE CLAUSE IS VIOLATED BY SINGLING OUT MINISTERIAL STUDENTS FOR DISPARATE TREATMENT

The factual posture of this case makes the consideration of the Free Exercise issues considerably easier than other situations which have been faced by this Court. Witters does not come to this Court asking it to create a special exception to a general rule because of his religion. Nor is he asking this Court to grant him funding when the state policymakers, the state legislature, has not seen fit to do so. Witters comes to this Court seeking nothing more than equal treatment with all other blind students. He merely asks this Court to prohibit the Department for the Blind from treating him in a disparate manner solely because he has chosen a religious career.

The Washington legislature enacted the statutory authorization for this program, R.C.W. 74.16.181, without limitation as to the career one could pursue. The eligibility statute, R.C.W. 74.16.183,²² simply required

²² Since the filing of this case, this eligibility statute has been repealed and replaced with R.C.W. 74.18.130 in 1983. The new

that eligible persons must have "no vision or . . . vision with correcting glasses [which] is so defective as to prevent the performance of ordinary activities for which eyesight is essential or who has an eye condition of a progressive nature which may lead to blindness." It is stipulated that Witters has met the statutory requirement for eligibility. C.P. C-2.

The Washington legislature has demonstrated that it knows how to create an exception for those who are studying for theological degrees²³ when it chooses to do so. In R.C.W. 28B.10.836, the legislature prohibited a program of general aid to students in private colleges from being used by those who were studying for degrees in theology.²⁴

R.C.W. 28B is the Higher Education Code for Washington, while R.C.W. Title 74, which contains the aid to the blind program, is the Public Assistance Code for the State. The legislature could, and apparently did, decline

statute provides in full:

"The department shall provide a program of vocational rehabilitation to assist blind persons to overcome vocational handicaps and to develop skills necessary for self-support and self-care. Applicants eligible for vocational rehabilitation services shall be persons who are blind as defined in R.C.W. 74.18.020 and who also (1) have no vision or limited vision which constitutes or results in substantial handicap to employment and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability."

This statute, like its predecessor, in no way limits the right of those who are studying for the ministry to participate.

²³ We assume that studying for the ministry would be fairly characterized as a degree in theology or "related area."

²⁴ This entire program was declared unconstitutional on state constitutional grounds in *Weiss v. Bruno*, 82 Wn. 2d 199, 509 P.2d 973 (1973).

to provide aid under the Higher Education Code to a general college student who was seeking a degree in theology. But in the area of Public Assistance, the legislature used its discretion to provide aid to all blind persons without a restriction against those studying for the ministry.²⁵

It was, therefore, not the policymakers of the State of Washington who excluded Witters from participation. It was the administrative agency which *sua sponte* decided that it would be unconstitutional to permit Witters to participate. It is interesting to note the Department's view of its legal requirements. The Assistant Attorney General for the Department signed the following stipulation:

At an earlier administrative hearing, the Deputy Director for the Commission [Department] admitted that its policy was such that the State would pay for Larry Witters['] training if he wanted to be a Communist agitator if there was a job available after such training, but that payments to train him to be a pastor were illegal.

See, Petitioner's Proposed Factual Stipulation before the Office of Hearings (August 21, 1980) signed by counsel for both parties. J.A. 6.

Thus, it is clear that the Department saw no restraint on paying for training for a career which would advance a

²⁵ The Commission for the Blind's original decision cites R.C.W. 28B.10.836 as requiring it to exclude Witters from participation. See, letter of Bill Gannon dated March 11, 1980. J.A. 3. However, when Witters pointed out that 28B.10.836 had no relevance to the aid for the blind program, counsel for the Department abandoned the argument contending that said statute was cited for illustrative purposes only. See, Respondent's Memorandum of Authorities, before the Office of Hearings, (August 25, 1980) p.1.

political philosophy, but believed that it was illegal to pay for the training of one who would advance a religion.²⁶

It was Witter's choice of a religious career, nothing more or less, which caused the administrative agency to conclude that it would be "illegal" to permit Witters to participate in the program.

The Free Exercise Clause challenge would be substantially more difficult if it had been the policymakers, i.e., the state legislature, which had excluded Witters. But this factual pattern demonstrates that it was a state administrative agency which decided to meddle with the authority of both the legislature and the courts by deciding that Witters should not participate because it was "unconstitutional" for him to do so.

The decisions of this Court leave no room for doubt that a state agency which creates a special exception in order to deny general public welfare benefits to a person solely because of his religious occupation violates the Free Exercise Clause of the First Amendment.

This Court's long-standing interpretation of the Free Exercise Clause is that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available government program." *Thomas v. Review Board*, 450 U.S. 707, 716

²⁶ The Department's view of what type of training it may assist is curious in light of this Court's statement in *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943):

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis added).

(1981). See also, *Sherbert v. Verner*, 374 U.S. 398 (1963). Since the decision of this Court in *McDaniel v. Paty*, *supra*, it is beyond debate that the choice of the ministry as a career falls within the protection of the Free Exercise Clause. "[T]he right of the free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions, or, in other words, to be a minister . . ." 435 U.S., at 626. The language this Court applied to the Rev. McDaniel applies with equal force to Witters. This Court said: "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." 435 U.S., at 626.

Witters was disparately treated for precisely the same reason as McDaniel, "the . . . disqualification operates . . . because of his *status* as a 'minister.' . . ." 435 U.S., at 627. Witters faces the choice of giving up his chosen vocation as a minister or giving up his right of participation in the program of aid for the blind. This is the same type of choice which McDaniel faced and which this Court ruled to be unconstitutional. "[U]nder the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.'" 435 U.S., at 626.

In *Thomas v. Review Board*, *supra*, as in *Sherbert v. Verner*, 374 U.S. 398 (1963), the employee quit his job because of changed work conditions which required him to choose between violating his religious faith and con-

tinuing his employment. In both of these cases, there was a uniform policy that all persons who were unemployed for personal reasons could not receive unemployment benefits. This Court held, in both cases, that since the employees had become unemployed solely in adherence to their religious principles that it was a violation of the Free Exercise Clause to apply the general rules which denied benefits to them.

Perhaps, Mr. Justice Douglas, in *Sherbert*, framed the question in a way that succinctly demonstrates the Free Exercise problem here. He said: "If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker." 374 U.S., at 412. If Witters receives payments from the Department for the Blind, it will be because he is blind, not because he desires to be a minister. Just as *Sherbert* and *Thomas* could not be disqualified from participation solely because of their adherence to their religious faith, Witters may not be disqualified solely because of his religious career choice.

While we rely on the authority of both *Thomas* and *Sherbert*, we believe that the facts in this case demonstrate such a clearcut violation of the Free Exercise Clause that even the dissenters in *Thomas* and *Sherbert* would agree with us here. In *Thomas*, Mr. Justice Rehnquist, in dissent, complained that the majority required Indiana to create a religiously-based exception to their general policy of excluding those who quit for personal reasons for unemployment. 450 U.S., at 720-727. In the same manner, in *Sherbert*, Mr. Justice Harlan, joined by Mr. Justice White, dissented saying: "I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case." 374 U.S., at 423. Witters

does not ask for an exception to the general rule of eligibility in his case. Rather, he asks that the general rule be applied with equality to him despite his religion. He became eligible for aid because of an eye disease, not because of his religion. But his religion cannot, by virtue of the command of the Free Exercise Clause, be the sole grounds for his disqualification.

If *Sherbert* and *Thomas* were entitled to participation in the neutral government program of aid for the unemployed, as we believe they were, how much more should Witters be entitled to aid when it cannot even be argued that *he* is asking for an exception.

Justice Utter, dissenting in the State Supreme Court, discussed the applicability of the *Sherbert* and *Thomas* cases, concluding:

The facts of this case are very similar to those in *Sherbert* and *Thomas*. While the State is not obligated to provide handicapped vocational education assistance, once it decides to do so I believe that the free exercise clause forbids the state from penalizing those who have chosen religious careers by excluding them from a general financial aid program solely for that reason.

102 Wn. 2d, at 642, 689 P.2d, at 63-64.

In one sense this case is closer to *Sherbert* and *Thomas* in that it involves eligibility for a neutral program of public assistance. However, in another sense, it is closer to *Widmar* since Witters is seeking equality, not a special exception.

In *Widmar*, the policymakers of the university decided that religious groups should be excluded from the limited public forum which the university had created. This Court held that it was a violation of the Free Exercise Clause to

treat religious student groups disparately solely on the religious content of their speech.

We believe that the principle of *Widmar* regarding the Free Exercise Clause is controlling here. The Department for the Blind has disparately treated Witters solely because of the religious content of his vocational training.

Again, we rely on *Widmar*, but we believe that the facts of this case not only brings us within the protection of its principles, but also answers the dissent in that case. Mr. Justice White dissented in *Widmar*, arguing that while the Establishment Clause certainly would not be violated by permitting a religious group to participate, it was within the discretion of the board of the University to decide whether or not to create exceptions to the general rule. 454 U.S. at 282.

In the case at bar, it was not the policymakers who excluded Witters for reasons within their discretion, it was the administrative agency which superseded the decision of the state legislature and made a determination that it was unconstitutional to provide the aid. Thus, Witters' situation not only fits into the criteria announced by the majority in *Widmar*, it also meets the concerns raised in the dissent.

Thus, this case possesses a sufficiently similar factual pattern to bring it within the precedential holdings of *Sherbert*, *Thomas*, and *Widmar*. The factual distinctives of this case demonstrate that the Department for the Blind's decision is more certainly violative of the Free Exercise Clause than even these three cases which we believe are controlling and upon which we rely.

We believe that we have demonstrated that the Department for the Blind's decision to exclude Witters from participation violates his right to the free exercise of

religion. However, the possibility exists, however remotely, that the Department could overcome this violation by demonstrating that their exclusion of Witters was required to further some compelling state interest. This Court has set forth the necessary showing which the Department must make in order to justify its denial of the free exercise of religion.

The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence for all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, [406 U.S. 205], 215 [(1972)].

Thomas v. Review Board, *supra*, 450 U.S., at 718.

The only reason that the Department for the Blind disqualified Witters was its belief that it was unconstitutional to permit him to participate. The Department contended, and the state courts found, that his participation was barred by the Federal Establishment Clause and by similar state constitutional provisions.

While it is obviously important for states to obey the Constitution of the United States and the State of Washington, this Court has repeatedly rejected similar justifications for denying the free exercise of religion. In *Sherbert*, *Thomas*, *Widmar*, and *McDaniel*, the state in each case raised the claim that the inroad on religious liberty was justified in the name of preserving the "separation of church and state." And in each case this Court rejected the claim whether it was based on the federal or the state constitution.²⁷

²⁷ See, *Sherbert*, 374 U.S., at 409-410; *Thomas*, 450 U.S., at 719-720; *McDaniel*, 435 U.S., at 628-629; and *Widmar*, 454 U.S., at 273.

The majority of the Washington Supreme Court chose to avoid ruling on the state constitutional issues. Nonetheless, even if they had ruled that permitting Witters to participate violated the State Constitution, the application of the Free Exercise Clause would still overrule the state exclusion. Assuming that the State Constitution does not permit Witters' participation,²⁸ the case is still indistinguishable from *Widmar*. In *Widmar* this Court assumed that the state constitution prohibited the student group from meeting on campus. And in *McDaniel*, the state constitution specifically prohibited ministers from running for public office. Yet in both cases this Court held that the Free Exercise Clause prevailed over the state constitutional exclusions.

Thus, if the Department fails to convince this Court that the federal Establishment Clause prohibits Witters' participation, then their only claim to a compelling state interest evaporates. We believe that we have shown that the Establishment Clause cannot possibly be construed to prohibit the aid, therefore the claim of a compelling state interest which justifies the denial of the right of free exercise must necessarily fail.

²⁸ The two provisions of the State Constitution are Article IX §4, which requires schools maintained with public funds to be free from sectarian influence or control, and Article I §11 which prohibits public monies from being used for religious worship, exercise, and instruction, or the support of any religious establishment. See, Justice Utter's excellent dissent in this case for a dispositive historical analysis of the intent and meaning of these sections. 102 Wn.2d, at 643, 689 P.2d, at 64.

CONCLUSION

The Religion Clauses of the First Amendment must be construed in harmony. When the Establishment clause is extended beyond what this Court has said and what the Founders intended, there is an inevitable danger that the Free Exercise Clause may be violated in the process. This is such a case.

Petitioner respectfully urges this Court to reverse the decision of the Washington Supreme Court and to remand with directions to allow him to participate in the program of aid to the blind in accordance with the statute. If his choice of a religious career is the sole basis for disqualification, then he must be permitted to participate and to recover amounts authorized for training he has already taken.

June 6, 1985

Respectfully submitted,

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13
No. 84-1070

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,
Respondent.

**On Writ of Certiorari To The
Supreme Court of the State of Washington**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Does the Establishment Clause prohibit a State from utilizing a vocational rehabilitation program, which meets the federal requirements for such program under 29 U.S.C. §§ 720-722 and applicable federal regulations, to fund the training of a handicapped person for the ministry?

II. If the Establishment Clause does not impose such a prohibition, does the State's refusal to provide the funding for such training, as required by State constitutional provisions, violate the Free Exercise Clause?

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**On Writ of Certiorari To The
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BRIEF FOR RESPONDENT

CONSTITUTIONAL, STATUTORY AND
REGULATORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions contained at pages 2-3 of Petitioner's Brief, the following provisions are involved.

Washington Constitution, Article I, § 11:

"No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment * * *

Washington State Constitution, Article IX, § 4:

"All schools maintained or supported wholly or in

part by the public funds shall be forever free from sectarian control or influence."

29 U.S.C. §§ 720-722, which are reproduced as Appendix A.

RCW 74.18.130 which is reproduced as Appendix B.

34 C.F.R. §§ 361.32, 361.33, 361.39, 361.40 and 361.41 which are reproduced as Appendix C.

COUNTERSTATEMENT OF THE CASE

In 1979, petitioner Larry Witters applied to the then Washington State Commission for the Blind for vocational rehabilitation services pursuant to RCW 74.16.181 which, at the time, provided, in part:

"The commission may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. * * * Under such program the commission may;

"* * *

"(3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, * * *"

An applicant for services from the Commission had to meet the requirements of RCW 74.16.183. Mr. Witters qualified under the requirement that an applicant have "an eye condition of a progressive nature which may lead to blindness."²

²In 1983 the Washington Legislature repealed chapter 74.16 RCW, abolishing the Commission for the Blind and creating a new state agency, the Department of Services for the Blind. See Washington Laws of 1983, chapter 194, § 3, effective June 30, 1983. The vocational rehabilitative services to be provided by this new department are now found in RCW 74.18.140, which reads in part:

"The department may provide to eligible individuals vocational rehabilitation services, including * * * vocational counseling, guidance, referral, and placement; rehabilitation training; * * * and other goods and services which can be reasonably expected to benefit a client in terms of employability."

³The current eligibility requirements for the program are found in RCW 74.18.130, which reads:

The vocational rehabilitation program at issue is a federally funded program (Pet. App. C-2, J. App. 7). The federal funding is pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 720, *et seq.*, which provides grants to states "to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." 29 U.S.C. § 720(a).

The Commission for the Blind was, and the Department of Services for the Blind now is, the designated state agency eligible to receive funds under this program as applied to the blind. As such it is governed by federal regulations found in 34 C.F.R. part 361. (See relevant portions in App. C.)

Mr. Witters sought assistance from the Commission in order to go to Inland Empire School of the Bible to pursue education and training to become a pastor, missionary or Christian educator (Pet. App. F-2 — F-3).³ The Commission, however, denied his application on the ground that:

"The department shall provide a program of vocational rehabilitation to assist blind persons to overcome vocational handicaps and to develop skills necessary for self-support and self-care. Applicants eligible for vocational rehabilitation services shall be persons who are blind as defined in RCW 74.18.020 and who also (1) have no vision or limited vision which constitutes or results in a substantial handicap to employment and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability." (Emphasis supplied).

The underlined requirements were new in 1983.

Because of these changes it is unclear whether Mr. Witters is currently eligible for assistance. The Department has had no physical contact with Mr. Witters to determine if these requirements would be met.

³Because of the length of time that this case has been pending, Mr. Witters, at the time of his initial application in 1979, had not entered the school. However, by the time of the entry of the findings of fact, conclusions of law and order in the superior court, May 26, 1982 (Pet. App. C), Mr. Witters had apparently enrolled as a student in the school, originally pursuing a three-year Bible diploma course of study and then switching to the four-year program, which would also lead to a bachelor of arts degree (Pet. App. A-3, C-3). The Department does not know whether Mr. Witters ever completed his course of study.

"* * * the Washington State Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas." (J. App. 4).

This was reiterated in the letter of denial dated March 11, 1980 (J. App. 1-2).

No individualized written rehabilitation program was ever created as required by 29 U.S.C. § 722(a) together with 34 C.F.R. § 361.40 and .41. That was so because the decision to deny this specific aid request was made *at the threshold* of a usually very lengthy process of state involvement with a vocational rehabilitation client.

Mr. Witters requested an administrative hearing under the provisions of RCW 74.16.520, which resulted in an initial decision affirming the denial of aid (Pet. App. F.).

Mr. Witters next requested a further review of the initial decision—which was upheld in all respects. (Pet. App. E). An appeal was then taken to the superior court pursuant to the provision of RCW 74.16.530(1). The superior court, after hearings, likewise upheld the Commission's order based upon the provisions of the Washington State Constitution (Pet. App. C and J. App. 7-10), and a further appeal was taken from that decision which was certified to the Washington Supreme Court.

At each stage in the litigation the Commission and its successor continued to base its denial of the application on the State Constitution. Conversely, at no point did either agency contend that a grant of assistance to Mr. Witters would also violate the establishment clause of the First Amendment to the United States Constitution since the state constitutional provisions are more stringent regarding the separation of church and state.⁴

⁴Article I, § 11 of the Washington State Constitution provides, in part:

"No public money * * * shall be * * * applied to any religious * * * instruction, or the support of any religious establishment.

Article IX, § 4 provides:

"All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

The Washington Supreme Court, by a seven to two majority, affirmed the Commission's decision to deny vocational rehabilitation assistance to Mr. Witters. It did so, however—acting on its own motion, so to speak—on the basis of the establishment clause of the First Amendment rather than the above-noted religion clause of the Washington State Constitution (Pet. App. A-2). Applying the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court held that although the first prong (non-sectarian program) was met (Pet. App. A-7), the second prong (primary effect) was not. The court concluded that "the principal or primary effect of the aid sought by [Mr. Witters] would be to advance religion" (Pet. App. A-10). It reached that conclusion by focusing "on the particular aid sought by the [petitioner]" since it was the "only transaction presently before [the court]"—rather than on the vocational rehabilitation program as a whole (Pet. App. A-8). The court did not consider the third prong (excessive entanglement) since it had "held that the aid sought by the [petitioner] would violate the establishment clause because it would have the primary effect of advancing religion" (Pet. App. A-12).

The Washington Supreme Court then, in turn, rejected petitioner's claim that his rights were infringed under the Free Exercise Clause of the First Amendment (Pet. App. A-14 to A-16), but the court did not address his equal protection clause claim since its opinion was not based upon the State Constitution (Pet. App. A-16 — A-17).

SUMMARY OF ARGUMENT

The procedural history just described is the source of several unusual features in this case. The first is the position in which we find ourselves as counsel for the respondent. In the typical establishment clause cases which have reached this Court, the role of the state attorney general has been to defend the constitutionality of the state statute or program under challenge. And that is certainly the role we prefer.

Indeed, as seen from the procedural history, we have

tried from the beginning to have the petitioner's claim decided on the basis of the religion clauses of our State Constitution, rather than the establishment clause. The reason for this effort was that, at least in our view, these state constitutional provisions afforded the simplest and surest grounds for disposing of the petitioner's claim. See, *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1973). As noted by the State Supreme Court in commenting on *Weiss* in the opinion below, "* * * our state constitution requires a far stricter separation of church and state than the federal constitution * * *" (Pet. App. A-2).

This procedural history also explains why the record in this case is much more sparse than in a typical establishment clause case. Under Article I, § 11 of our State Constitution, which prohibits the application of public money "* * * to any religious * * * instruction * * *", there was only a need to focus upon a fact on which all are agreed, *viz.*, that the petitioner wants the state to pay for his religious training, to fit him to pursue a religious career. Under *Weiss* there was no necessity to examine closely, if at all, the nature and operation of the overall program under which the state was to pay for that training.

Now, however, the nature and operation of that program become critical. And while the record tells us little about that program, various statutes and regulations, especially on the federal level, tell us a great deal. Further, even under a view of this Court's establishment clause decisions which accommodates as much as possible the interests of religious education—a view which we share with the petitioners and the Solicitor General—this particular program presents insuperable problems when applied to the petitioner.

Our disagreement with the briefs of the petitioner, the Solicitor General, and other *amici curiae*,⁵ accordingly, centers more on the relevance than on the accuracy of what they say about this Court's establishment clause decisions.

⁵In this brief, we focus principally on the briefs of the petitioner and the Solicitor General.

For those briefs have overlooked or obscured the decisive factor in this case. They would make it appear that the program under which the petitioner makes his claim is the same, in all essentials, as the "GI Bill" or other federal programs such as "Pell Grants." Indeed, the court below may have also had a similar belief. But in fact the program is radically different from those federal programs; and it is those differences which require affirmance of the court below.⁶

We first examine those differences. The program involved here is a federally assisted vocational rehabilitation program, not a general scholarship or student aid program. Thus the program here necessarily involves the fitting together of three sets of elements, *viz.*, (1) the particular skills and aptitudes of the specific individual, (2) the particular educational program which that individual wishes to enter, and (3) the specific type of job the individual wants. All three sets of elements must be evaluated by a state official in order to determine whether a particular type of job is likely to be available, whether that job fits the particular individual, and whether the specific educational program, including a particular school, is the best one for helping the individual attain that job.

All of these evaluations and judgments must be made by the State before it spends money on a specific individual. Indeed, they are made on a continuing basis, *i.e.*, annually by the State in order to assure that the money is being expended effectively.

A program such as the GI Bill, in contrast, requires none of these sorts of governmental evaluations and judgments. How the money will be expended is determined not by the government, but rather "* * * only as a result of numerous, private choices of individual" citizens. *Mueller*

⁶We thus submit that the court below was right, but for reasons which it failed to articulate fully. This failure may be the source of the concern, particularly on the part of the Solicitor General, over the effect of the decision below on the GI Bill and Pell Grants as applied to ministerial students. That concern, as we shall show, is misplaced. Under our submission, those federal programs are in no jeopardy.

v. Allen, 463 U.S. 388, 399 (1983). Under the GI Bill, or any similar program, the government does not care whether a particular job, or indeed any job at all, will be available after college, or whether any particular school will be best for a particular type of job. And whether the individual's skills and aptitudes fit with a particular course of studies is the concern solely of the individual and the school authorities, not the government. As long as the individual can stay in an accredited school, the government keeps paying until he finishes school or his benefits run out.

To be sure, the government *could* provide a GI Bill type of program for persons who are blind or otherwise vocationally handicapped, and thereby avoid all the evaluations and judgments of the sort involved here. It could say: "What school you choose is none of our concern; and as long as you stay in school, we'll keep paying. Further, what happens to you after school is none of our concern either."

Such a program would, however, undoubtedly be a much more expensive program; and it certainly is not the program in place in the State of Washington and before the Court.

To show the types of evaluations and judgments which the State must make, we will review the various federal statutes which establish the conditions for federal assistance for the program, and the federal regulations under which it the program is operated. These statutes and regulations clearly show the government involvement and supervision in every step of the decision-making process, a process in which government choices and private choices are inextricably intertwined.

After our review of these statutes and regulations, we will turn to the recent decisions of this Court which apply the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. at 612-613. Under those decisions, this intertwining of government and private choices which is inherent in the program prevents that program from being used to fund studies for the ministry. This is because of the second

and third prongs of that test, *viz.*, the "effect" prong and the "entanglement" prong.

Again, the contrast between a "GI Bill" type of program and this vocational rehabilitation program illustrates our point. Under the former type of program, there is no danger of a "symbolic union" of government and religious activities and no "imprimatur of state approval on religious sects and practices." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), quoted in *Grand Rapids School District v. Ball*, No. 83-990 (July 1, 1985), slip. op. at 16. Not so here, however. Further, there is in a GI Bill type of program no appreciable danger of entanglement between governmental and religious activities; here, however, such entanglement "* * * inheres in the situation." *Lemon v. Kurtzman*, 403 U.S. at 617, quoted in *Grand Rapids School District, supra*, slip. op. at 13. Far from just a danger of entanglement, we here have a certainty if the program operates as it is designed. Nor is there any way, administratively, to operate the program in a manner which both avoids the entanglement and still complies with the federal requirements.

The nature of the entanglement present here is admittedly somewhat different from that involved in *Lemon* and in such cases as *Aguilar v. Felton*, No. 84-237 (July 1, 1985). In those cases the entanglement arose because of the continuing supervision necessary to assure that the state aid was not used for religious purposes, and that the second prong of the *Lemon* test was thus not violated. Here, the continuing state supervision serves a function which, while different, makes the entanglement problem even more aggravated than in those cases; its function is not to keep religious and secular training separate, but to make sure that a program of religious training is being carried out in a manner, and with results, acceptable to the State.

We will then conclude with a word on the free exercise issue. The decision of the court below is consistent with the free exercise clause for the same reason that the decisions of this Court such as *Lemon, supra*, and *Grand Rapids* are consistent with that clause. That is, the free

exercise clause does not make constitutionally valid those state programs and administrative actions which are invalid under the establishment clause. There is, we would agree, a tension between the two clauses, a tension which indeed is present in this case. That tension, however, does not make the establishment clause any less applicable than it was in *Lemon*, *Grand Rapids*, and similar decisions of this Court.

ARGUMENT

I.

The Establishment Clause Prevents a State From Funding the Education of a Ministerial Student Under a Vocational Rehabilitation Program Which Requires That the State Evaluate and Determine the Suitability of the Individual Student for a Religious Career, the Availability of Employment in That Career, and the Suitability of a Specific Education Program for That Career.

A. Nature of the Vocational Rehabilitation Program for the Blind.

The nature of the program here involved can perhaps be best seen by comparing it with other types of educational programs found on the federal level, the most familiar of which is the "GI Bill." See, 38 U.S.C. §§ 1500-1521, 1601-1643, 1651-1693, and 1700-1766. The "GI Bill" and other similar federal programs are fully described by the Solicitor General in his *amicus* brief, pp. 2-4. As that description shows, such programs have two important characteristics. First, they do not exclude ministerial students from their scope. Secondly, the hand of the government is not intrusive at all; on the contrary, a "hands off" policy on the part of the government is embedded in these programs.⁷ The school which the student wishes to attend

⁷Our basic submission in this case can be summarized in terms of these two features: any program of educational aid which does not fully incorporate a "hands off" policy cannot include aid for ministerial studies.

must be accredited by a recognized national or state accrediting agency. Beyond that, all choices are those of the student and the school. The government does not care, and cannot control, which type of career the student might seek, or indeed, whether the student has a career goal at all. If the student wishes to take a degree in theology, simply because he is interested in theology, and then to become a baseball player, rather than a minister, that is of no concern to the government. Nor is it the government's concern whether the student is suited for a particular career, be it in baseball, religion or anything else. If he happens to choose to pursue a religious career, and attend a seminary for the necessary training, his suitability for that career will be determined by seminary or other church authorities, not by the government. Further, if the student chooses a school to obtain training in a career choice for which there are no opportunities in the job market, that too is of no concern to the government.

While a "GI Bill" type of program embodies a "hands off" policy, the vocational rehabilitation program embodies quite the opposite, *viz.*, a "hands on" policy which permeates the whole program. And this policy is traceable, we suggest, to the federal statutes and regulations which authorize federal financial assistance for the program and establish the requirements which the state must meet in order to obtain such assistance. We thus begin our examination of the nature of the program with a look at these statutes and regulations.

The federal assistance is provided pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 720, *et seq.* Section 720(a) provides:

"The purpose of this title is to authorize grants to assist States to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities."

The goal is gainful employment; but that employment, and the training necessary to attain that employment are to be matched to the needs and capabilities of the

individual. This matching function for a specific individual becomes even more prominent in subsequent statutory provisions.

Thus, § 721 establishes the requirements for state plans which are eligible for the federal assistance. Among other requirements, the state plan must provide that an "individualized written rehabilitation program * * * will be developed for each handicapped individual * * *" Section 721(a)(9). Section 722, in turn, spells out what the individualized rehabilitation program must contain, and how it is to be administered.

"* * * The Commissioner [of the federal Rehabilitation Services Administration] shall insure that the individualized written rehabilitation program, * * * *in the case of each handicapped individual is developed jointly by the vocational rehabilitation counselor or coordinator and the handicapped individual* (or, in appropriate cases, his parents or guardians), and that such programs meets the requirements set forth in subsection (b) of this section. * * *" § 722(a). (Emphasis supplied)

Section 722(b) provides in pertinent part:

"Each individualized written rehabilitation program shall be *reviewed on an annual basis* at which time each such individual (or, in appropriate cases, his parents or guardians) will be afforded an opportunity to review such program and jointly redevelop and agree to its terms. Such program shall include, but not be limited to (1) a statement of *long-range rehabilitation goals for the individual and intermediate rehabilitation objectives related to the attainment of such goals*, (2) a statement of *the specific vocational rehabilitation services to be provided*, (3) the *projected date for the initiation and the anticipated duration of each such service*, (4) *objective criteria and an evaluation procedure and schedule for determining whether such objectives and goals are being achieved*, * * *" (Emphasis supplied)

Section 722(c) provides in pertinent part:

"The Commissioner shall also insure that (1) in making any determination of ineligibility referred to in subsection (a) of this section, or *in developing and*

carrying out the individualized written rehabilitation program required by section 101 [29 U.S.C. § 721] in the case of each handicapped individual, *emphasis is placed upon the determination and achievement of a vocational goal for such individual*, (2) a decision that such an individual is not capable of achieving such a goal and thus not eligible for vocational rehabilitation services provided with assistance under this part [29 U.S.C. § § 720, *et seq.*], is made only in full consultation with such individual (or, in appropriate cases, his parents or guardians), and only upon the certification, as an amendment to such written program, or as a part of the specification of reasons for an ineligibility determination, as appropriate, that the preliminary diagnosis or evaluation of rehabilitation potential, as appropriate, has demonstrated that such individual is not then capable of achieving such a goal, * * *" (Emphasis supplied)

Under § 722(a)-(c), quoted above, joint agreement by the individual client and his counselor is contemplated for every step in the development and implementation of the individualized rehabilitation plan. But if the client disagrees with a decision of his counselor, a government official, either state or federal, has the final word. See, § 722(d) entitled, "Review by Director of determinations by rehabilitation counselors or coordinator; review of final decision of Director by Commissioner."

Under § 722 then, all decisions and determinations ultimately rest with the government. But § 722 does assure that the individual has input into the decision-making process. As stated in the Senate Report on the Rehabilitation Act of 1973:

"After hearing extensive testimony and reviewing the data supplied to the Committee by the Department of Health, Education, and Welfare, it became apparent that the *individual client was not being sufficiently consulted on his own behalf in tailoring the rehabilitation program to his individual needs*. This concern led to the adoption in section 102 of the bill [29 U.S.C. § 722] of the formal written rehabilitation program requirement for every individual who is served under the vocational rehabilitation program.

"* * *

"It is the purpose of the Committee, in requiring an individualized written rehabilitation program, to assure that each handicapped individual has an opportunity to participate in the decisionmaking regarding services he is or is not to receive; to have a written understanding that specifies the services to be provided and the objectives they are to achieve; to be able to obtain information on the progress he is making with regard to the objectives of the program; and to rewrite jointly with the rehabilitation agency the program when it is apparent that the stated objectives cannot be achieved. * * * " S.Rep. No. 93-318, 93rd Cong., 1st. Sess. 24 (1973). (Emphasis supplied)

One additional feature of the federal system should be noted. The regulations require the state to provide two types of diagnostic studies for the individual. The first is called the "preliminary diagnostic study," and the determinations to be made under that study are the following:

"(1) Whether the individual has a physical or mental disability which for that individual constitutes or results in a substantial handicap to employment; and

"(2) *Whether vocational rehabilitation services may reasonably be expected to benefit the individual in terms of employability, or whether an extended evaluation or vocational rehabilitation potential is necessary to make this determination.*" 34 C.F.R. § 361.32(a)(1)-(2). (Emphasis supplied)

At this juncture, the second determination is the important one. That determination requires, among other things, consideration of "employability," which, as defined in the regulations,

"* * * refers to a determination that the provision of vocational rehabilitation services is likely to enable an individual to enter or retain employment consistent with his capacities and abilities in the competitive labor market; the practice of a profession; self-employment; homemaking; farm or family work (including work for which payment is in kind rather than in cash); sheltered employment; homebound employment; or other gainful work." 34 C.F.R. § 361.1(c)(2). (Emphasis supplied)

If this preliminary diagnostic study determines that vocational rehabilitation services will benefit the individual in terms of "employability," then a further diagnostic study is to be made, termed a "thorough diagnostic study," which apparently serves as the basis for the individualized rehabilitation plan required by 29 U.S.C. § 722. The scope of that study

"* * * includes in all cases to the degree needed, *an appraisal of the individual's personality, intelligence level, educational achievement, work experience, personal, vocational, and social adjustment, employment opportunities, and other pertinent data helpful in determining the nature and scope of services needed.* The study also includes, as appropriate for each individual, an appraisal of the *individual's patterns of work behavior, ability to acquire occupational skill and capacity for successful job performance.*" 34 C.F.R. § 361.33(b). (Emphasis supplied)

Such is the federal system under which the state must operate its program for the blind.⁸ How would the system operate in the case of a disabled person, such as the petitioner, who wishes to attend a training program for the ministry? What sorts of evaluations must the counselor or other state official make under the "preliminary" and subsequent "thorough" diagnosis? And what sorts of decisions must be made in formulating individualized written rehabilitation program?

Obviously, the individuals' aptitudes for the ministry must be evaluated. This evaluation would necessarily include the individual's "personality, intelligence level, educational achievement, work experience, personal, vocational, and social adjustment * * *" insofar as they might make him fit or unfit for the ministry. 34 C.F.R. § 361.33(b). And this would necessarily include an evalua-

⁸The implementing regulations on the state level follow the pattern of individualized diagnosis and evaluation established in the federal statutes and regulations. See Wash. Admin. Code ch. 67-25. These federal statutes and regulations, we should note, cover not just programs for the blind, but all federally assisted programs under the Rehabilitation Act of 1973, 29 U.S.C. § 720, *et seq.*

tion of what characteristics should be found in a successful minister. Further, an evaluation must be made of "employment opportunities." *Id.* In other words, there must be an evaluation of the market for ministers in the particular denomination with which the individual wishes to be affiliated. (The possibility of no denominational affiliation, of course, may exist; but that market too would have to be evaluated if the individual wished to be such a minister.)

If these evaluations are positive, then the right training program must be determined, so that it can be incorporated into the individualized written rehabilitation program required under § 722. This would require an evaluation of the training provided (*e.g.*, at the Inland Empire School of the Bible or Whitworth College) to assure that the individual will be prepared for the particular type of ministry which is his vocational goal. Is the training at these schools adequate? Is better training available elsewhere? If so, where? And how is it better? These are the sorts of questions the state must answer.⁹

Evaluations of this sort are not just likely, but indeed cannot be avoided under the system we are dealing with here. Yet, it is difficult to imagine evaluations which are more at odds with the values embodied in the establishment clause as construed by the decisions of this Court.

B. Under the Second Prong of the Lemon Test, the Vocational Rehabilitation Program Cannot be Used to Fund the Training of Ministerial Students.

While we believe the court below was correct in denying the petitioner relief on the basis of the second prong of the *Lemon* test, *viz.*, the "effect" prong, we differ with that

⁹The petitioner's failure to comprehend the nature of the program is strikingly shown by the following passage in his brief:

"The choices as to which school to attend and which career to pursue are entirely up to the blind individual. No agency of the state has the power to influence the choice. * * *" Pet. Br. at page 20.

Both statements are absolutely incorrect.

court as to the proper approach which should be taken in applying the prong.

As correctly pointed out by both the petitioner and the Solicitor General, the court below focused solely on the specific financial aid to the petitioner for funding his ministerial studies. It did not consider the nature of the overall program under which that aid was to be provided. Pet. Br. 29-34, U.S. Br. 23-27. But these criticisms, though not without force, should not change the result in this case. For the nature of the overall program here involved requires rejection, not acceptance, of the petitioner's claim. To show why this is so, we must first examine more closely the second prong, as applied in cases subsequent to *Lemon*.

Though cast in terms of "principal or primary effect," *Lemon*, 403 U.S. at 612, this way of describing that prong has become something of a misnomer. As noted by one commentator:

"* * * [W]hile retaining the earlier label, the Court has transformed it [the second prong] into a *requirement that any non-secular effect be remote, indirect and incidental*. This shift is significant, for the remote-indirect-and-incidental standard plainly compels a more searching inquiry, and comes closer to the absolutist no-aid approach to the establishment clause than the primary effect test did." (Emphasis in original) Tribe, *American Constitutional Law* (1978), p. 840.

Thus, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court, in invalidating a state tuition supplement program for private schools, declined to determine whether the aid to parochial schools which resulted from that program was "primary" or "secondary," rejecting the proposition that "such metaphysical judgments are either possible or necessary * * *" 413 U.S. 756, 783-84, n. 39. As further stated in *Nyquist*:

"* * * 'Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.' * * *" *Id.*

But how does one distinguish a "direct and immediate effect," from an indirect, remote, and incidental effect? Are such judgments any less "metaphysical" and any more "possible" than judgments as to what is "primary" and what is "secondary"?

Mueller v. Allen, 463 U.S. 388 (1983), we believe, sheds light on these questions, and shows what is really at the core of the second prong of the *Lemon* test. *Mueller* involved a state program under which parents could deduct for state income tax purposes their expenditures for tuition and other school costs. Though parents of parochial school children were the primary beneficiaries of the program, in terms of numbers, the program applied to all parents of school children, whether the children were in private or public schools. From the point of view of the parents of parochial school children who had enough income to receive financial benefit from the tax deductions, the program itself was hardly distinguishable from that invalidated in *Nyquist*. Yet the court upheld it, as applied to such parents, even while recognizing that this sort of aid to the parents "ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." *Mueller*, 463 U.S. at 399.

The court went on to say:

"Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' * * * can be deemed to have been conferred on any particular religion, or on religion generally." *Id.*

Thus, one of the important elements at the core of the second prong is the element of symbolism. Will the program in question be perceived as conferring any "imprimatur of state approval" on any particular religion or on religion generally? If so, the effect of aiding religion will be found to be direct and immediate, and thus violative of the second prong, rather than indirect and incidental.¹⁰

¹⁰For a discussion of the importance of symbolism in applying the second prong, see Tribe, *op. cit.*, pp. 843-845. This importance has been expressly recognized in the more recent decisions of this court, as shown

There are, to be sure, methods by which a government can provide financial assistance for a religious education while still avoiding the fatal symbolism. That financial assistance can even be for ministerial studies. And in suggesting otherwise, the court below erred. The GI Bill and the system of tax deductions involved in *Mueller* are examples of such methods.¹¹

But under both of those methods the precise use of the financial assistance is determined "* * * only as a result of numerous, private choices of individual" citizens. *Mueller*, 463 U.S. at 399. That factor, along with their broad base of beneficiaries — who are determined without regard to any criteria having to do with religion — removes

by *Grand Rapids District, et al. v. Ball*, No. 83-990 (July 1, 1985), slip. op. 16-17;

"* * * As we stated in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-126 (1984): '[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.' See also *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (finding effect 'incidental' and not 'primary' because it 'does not confer any imprimatur of state approval on religious sects or practices').

"It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. * * *

"The difference in symbolic impact helps to explain the difference between the cases. The symbolic connection of church and state in the *McCollum* [*v. Board of Education*, 333 U.S. 203 (1948)] program presented the students with a graphic symbol of the 'concert or union or dependency' of church and state, see *Zorach*, [*v. Clauson*, 343 U.S. 306 (1952)] *supra*, at 312. This very symbolic union was conspicuously absent in the *Zorach* program." [footnote omitted]

¹¹So too are the financial aid systems for college students upheld in *Durham v. McCloud*, 259 S.C. 409, 192 S.E.2d 202 (1972), *app. dismissed* 413 U.S. 902 (1973) and *Americans United v. Blanton*, 433 F.Supp. 97 (M.D. Tenn.) *aff'd per curiam*, 434 U.S. 803 (1977).

from those two methods the fatal symbolism, and makes the aid to religion indirect and incidental.¹²

The vocational rehabilitation program involved here, we agree, also has a broad base. This feature, which is strongly emphasized by the petitioners and the Solicitor General, certainly cuts in favor of the program's constitutionality. But unlike the GI Bill and the program involved in *Mueller*, the program here requires government choices at every step of the rehabilitation process. And this further feature, we submit, overwhelms the effect of the first, and brings about the forbidden symbolic union.

In short, the court below was wrong in stating flatly and unqualifiedly: "It is not the role of the state to pay for the religious education of future ministers;" (Pet. App. A-10) this error, however, was not fatal to the court's result. For if the state takes on not only this role, but also the role of determining whether a person should be a minister at all, what his chances for success as a minister might be, and what sort of training and what specific school are appropriate for a particular type of ministry, then the state has indeed taken on a forbidden role. The determinative factor is the "* * * cumulative impact of the entire relationship * * *" arising because of these roles. *Lemon*, 403 U.S. at 614. And these roles do not become permissible simply because they are taken on as part of a broadly based program of assistance to handicapped persons generally.

It is this intertwining of governmental decisionmaking so closely with decisionmaking by church and school authorities, combined with the fact of state aid for ministe-

¹²Although our discussion has focused on the similarities between the GI Bill and the program involved in *Mueller*, there are certainly differences between these two types of programs. Benefits under the GI Bill are, in a sense, "earned" by the veteran, and can be looked upon as a type of deferred compensation, while the tax benefits in *Mueller* cannot. In terms of symbolism, this makes the case for the validity of the GI Bill, as applied to religious studies, even stronger. On the other hand, the provision of aid for ministerial studies, which can occur under the GI Bill, certainly raises, again in terms of symbolism, a more serious question than would provision of aid for general tuition in a religiously oriented school, as in *Mueller*.

rial studies, which forms the symbolic union. The program at issue here makes this intertwining inevitable if the state is to provide aid for such studies.

C. Under the Third Prong of the Lemon Test, the Vocational Rehabilitation Program Cannot be Used to Fund the Training of Ministerial Students.

The third, or "excessive entanglement," prong of the *Lemon* test was not considered by the court below, which found it "* * * ill suited to this case," impossible to apply because of the scanty record, and unnecessary to apply because of the court's conclusion under the second prong (Pet. App. A-12).

We believe, however, that the third prong should be considered and that it provides an additional ground for affirming the decision of the court below. Because the court below did not consider that prong, it thus did not look closely at the overall nature of the program, as established by the federal statutes and regulations. Had it focused on these statutes and regulations, however, the third prong problem would have become obvious.

The court below was correct in noting that the factual situation in *Lemon* was quite different from the factual situation here (Pet. App. A-11 — A-12). This factual difference makes the role of the third prong here somewhat different from its role in *Lemon*; but it no less important.

In *Lemon*, the relationship between the second and third prongs was roughly the relationship between the proverbial frying pan and the fire. In trying to separate out sectarian instruction from the secular in order to avoid funding the former and thereby avoid the second prong, one runs up against the third prong; for this very effort in marking the separation constitutes excessive entanglement, at least in the context of elementary and secondary schools. Compare, *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) and *Aguilar v. Felton*, No. 84-237 (July 1, 1985). The second and third prongs together create a type of "Catch-22," to use the phrase of Mr. Justice Rehnquist's

dissent in *Aguilar, supra*, slip op. 1 (Rehnquist, J., dissenting).

Here, however, there is no effort to separate out the religious instruction from the secular; presumably all of the instruction which the petitioner wishes to receive will be religious in nature or orientation, since all of that instruction will be designed to train him for the ministry.

In this context, the second and third prongs each provide a different lens for examining the same factual situation;¹³ and each emphasizes somewhat different establishment clause constitutional values which are impaired by that factual situation. The second prong, with its emphasis upon avoidance of any "symbolic union" of governmental and religious functions, focuses upon the message sent to the public. Will adherents perceive an endorsement and nonadherents see disapproval of their individual religious choices? See *Grand Rapids School Dist. v. Ball, supra*, slip. op. 16. The third prong focuses upon the danger to the religious freedom of the adherents and the institutions to which they adhere arising from the excessive administrative entanglement by the government.

The nature and degree of that administrative entanglement should, by now, be clear in this case; and we need describe it no further. Instead, we merely note that it is, like the entanglement in *Lemon*, one which arises from "[a] comprehensive, discriminating, and continuing state surveillance * * *" 403 U.S. at 619.

In *Lemon*, the surveillance was primarily over the teachers; here it is primarily over the student — though certainly with one eye on the teachers to assure that they are meeting the student's needs as determined by the rehabilitation counselor. But that does not make it any less comprehensive, discriminating, and continuing, nor any less intrusive into areas of great religious sensitivity.

¹³In this respect, this case is similar to *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), in which the Court invalidated a Massachusetts statute prohibiting the grant of a liquor license to an establishment located within 500 feet of a church if the church objected. The Court found this law invalid under both the second and third prongs. See 459 U.S. at 126,127.

Is there any way to avoid this surveillance and intrusion? The only possibility for doing so which we can envision would be to adopt a "hands-off" policy similar to that embodied in the GI Bill. Whether an individual should be a minister, and what sort of training he should receive would be left to the decisions of church and school authorities, not the government. The problem, however, is that there is no room for such a policy within the federal statutes and regulations here involved. See pp. 10-16, *supra*. Further, even if such a policy were legally possible, and were adopted by the state agency administering the vocational rehabilitation program, there is no assurance that it could be successfully implemented on the lower levels, *e.g.*, on the level of the individual counselor.¹⁴

In short, the problem of administrative entanglement is impossible of solution in any manner other than the one we here urge: *viz.*, not allowing the vocational rehabilitation program to be used for the funding of ministerial training at all.

II.

Denial of Funding for Ministerial Training Under the Vocational Rehabilitation Program Does Not Result in a Denial of Petitioner's Rights Under the Freedom of Religion Clause.

While the petitioner and the Solicitor General both argue that the court below should be reversed on the establishment clause issue, they disagree as to what the next step should be in the disposition of this case. The petitioner urges the Court to go on to consider the free exercise issue (Pet. Br. 40-49). The Solicitor General suggests that the Court not do so, but instead leave that issue for the court below to deal with on remand (U.S. Br. 27-29).

The solution to this problem will depend, to a large extent, on how the establishment clause issue is resolved.

¹⁴In this respect, we would then have both the "frying pan" and the "fire," as in *Lemon* and *Aguilar*.

If our submission on that issue is correct, the free exercise issue is thereby disposed of as well. For the free exercise clause cannot here validate a government program or action that is otherwise invalid under the establishment clause. There can be little doubt, for example, that such decisions as *Lemon*, *Nyquist*, *Grand Rapids*, and *Aguilar*, produce a severe practical restriction on the freedom of choice for parents, especially poor parents, to follow their religious convictions by sending their children to parochial schools. But surely the free exercise clause is not thereby violated. So too here.

If, however, the petitioner and the Solicitor General are correct on the establishment clause issue, the problem becomes less simple. If the religion clauses of our State Constitution were not independent obstacles to granting the petitioner the funding he wants, no free exercise issue would then even arise. The free exercise clause comes into play only where there is some prohibition against that funding in a statute or a state constitutional provision. It is clear that there are no such statutory prohibitions, state or federal. We believe, however, that the prohibitions exist in the religion clauses of the State Constitution, as discussed at pp. 5-6, *supra*, and these are the source of the problem.¹⁵

Let us be more specific: Should this Court determine that the court below erred in finding a violation of the establishment clause and remand this case to the court below that court, we fully expect, would follow *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1984). That is, it would find a violation of the religion clauses of the State Constitution which, as the same lower court noted in its opinion in this case, “* * * requires a far stricter separation of church and state than the federal constitution * * *” (Pet. App. A-2). In turn, the petitioner, in those

¹⁵The petitioner seems to suggest that the source of the problem is an arbitrary bureaucracy which “meddle[d]” in questions that are none of its businesses. Pet. Br. 43. We can only recommend that he read once again *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1984), and the comment on that case in the opinion below. (Pet. App. A-2).

proceedings on remand, would inevitably raise once again the free exercise issue, and the court below would be squarely faced with it. A ruling by this Court on that issue would thus facilitate a final disposition of this case, and thereby obviate the need for returning to this Court again.

For this reason, while recognizing the force of the Solicitor General’s suggestion that the free exercise issue not be considered, we urge the Court to resolve that issue as well if it resolves the establishment clause issue in favor of the petitioner. Accordingly, some additional discussion of the free exercise issue is appropriate.

The free exercise clause would, of course, be violated by an actual prohibition of religious schools; but governmental inability to prohibit is far different from a governmental duty to fund. As stated in *Harris v. McRae*, 448 U.S. 297 (1980), in upholding the validity of the “Hyde Amendment,” which prohibited payment of federal medical aid funds for certain types of abortions:

“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, * * * or prevent parents from sending their child to a private school, *Pierce v. Society of Sisters*, 268 U.S. 510, * * * government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. [Footnote omitted] Whether

freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement. * * * 448 U.S. at 317-318.

Here too, the petitioner would translate a limitation on government power into an affirmative funding obligation and effectively deny to the state any room for choice in determining the limits of what it will fund.¹⁶

This is not to suggest that the free exercise clause has no role at all to play in funding programs such as that involved here. If the program in *Mueller* had excluded from its scope tuition payments which parents made to Catholic schools, while allowing the deduction of tuition payments to all other types of parochial schools, that surely would have violated the free exercise clause. So, too, if the GI Bill permitted payment of tuition for all seminary students except Lutherans or Episcopalians. But there is, of course, no similar situation here.

Nor is the situation here similar to that in *Widmar v. Vincent*, 454 U.S. 263 (1982) or *McDaniel v. Patty*, 435 U.S. 618 (1978). In *Widmar*, a group of students were being denied the right of free speech on public university facilities because of the religious content of that speech, while all other groups — over 100 in all — were granted free access to those facilities. Conversely, however, Mr. Witters' right to free speech, including religious speech, is in no way involved here.

In *McDaniel*, a minister was denied the right to hold public office, simply because he was a minister. But surely the right to hold public office, along with all other citizens, is much more fundamental than the right to have the public pay for one's special education.

¹⁶The position of the petitioner seems to be that whatever the state may fund, consistent with the establishment clause, it *must* fund — in order to avoid a violation of the free exercise clause. More generally, the free exercise clause would prohibit a state from being more strict in the matter of separation of church and state than is required by the establishment clause. We believe this position is entirely too rigid.

CONCLUSION

For the reasons given above, the decision below should be affirmed. If it is not affirmed, the free exercise issue should be resolved in favor of respondent and the case then remanded to the Washington Supreme Court for further proceedings.

Respectfully submitted,

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APPENDIX A
29 U.S.C. §§ 720-722

§ 720. Federal grants

(a) Congressional declaration of purpose. The purpose of this title is to authorize grants to assist States to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities.

§ 721. State Plans

(a) Three year plan; annual revisions; general and specific requirements. In order to be eligible to participate in programs under this title, a State shall submit to the Commissioner a State plan for vocational rehabilitation services for a three-year period and, upon request of the Commissioner, shall make such annual revisions in the plan as may be necessary. Each such plan shall—

(9) Individualized written rehabilitation program.

provide that (A) an individualized written rehabilitation program meeting the requirements of section 102 [29 USC § 722] will be developed for each handicapped individual eligible for vocational rehabilitation services under this Act, (B) such services will be provided under the plan in accordance with such program, and (C) records of the characteristics of each applicant will be kept specifying, as to those individuals who apply for services under this title and are determined not to be eligible therefor, the reasons for such determinations in such detail as required by the Commissioner in order for him to analyze and evaluate annually the reasons for and numbers of such ineligibility determinations as part of his responsibilities under sec-

tion 13 [29 USC § 712], and that the State agency will at least annually categorize and analyze such reasons and numbers and report this information to the Commissioner and will, not later than 12 months after each such determination, review each such ineligibility determination in accordance with the criteria set forth in section 102 [29 USC § 722];

§ 722. Individualized written rehabilitation program

(a) Joint development by counselor or coordinator and handicapped individual; goods and services for handicapped individual; terms and conditions, rights and remedies. The Commissioner shall insure that the individualized written rehabilitation program, or the specification of reasons for a determination of ineligibility prior to initiation of such program based on preliminary diagnosis, required by section 101(a)(9) [29 USC § 721(a)(9)] in the case of each handicapped individual is developed jointly by the vocational rehabilitation counselor or coordinator and the handicapped individual (or, in appropriate cases, his parents or guardians), and that such programs meets the requirements set forth in subsection (b) of this section. Such written program shall set forth the terms and conditions, as well as the rights and remedies, under which goods and services will be provided to the individual, and, as appropriate, such specification of reasons for such an ineligibility determination shall set forth the rights and remedies, including recourse to the process set forth in subsection (b)(5) of this section, available to the individual in question.

(b) Annual review; joint redevelopment and agreement of terms; scope of program. Each individualized written rehabilitation program shall be reviewed on an annual basis at which time each such individual (or, in appropriate cases, his parents or guardians) will be afforded an opportunity to review such pro-

gram and jointly redevelop and agree to its terms. Such program shall include, but not be limited to (1) a statement of long-range rehabilitation goals for the individual and intermediate rehabilitation objectives related to the attainment of such goals, (2) a statement of the specific vocational rehabilitation services to be provided, (3) the projected date for the initiation and the anticipated duration of each such service, (4) objective criteria and an evaluation procedure and schedule for determining whether such objectives and goals are being achieved, and, (5) where appropriate, a detailed explanation of the availability of a client assistance project established in such area pursuant to section 112 [29 USC § 732].

(c) Determination and achievement of vocational goal; decision respecting potential and capability of achievement; annual review of decision. The Commissioner shall also insure that (1) in making any determination of ineligibility referred to in subsection (a) of this section, or in developing and carrying out the individualized written rehabilitation program required by section 101 [29 USC § 721] in the case of each handicapped individual, emphasis is placed upon the determination and achievement of a vocational goal for such individual, (2) a decision that such an individual is not capable of achieving such a goal and thus not eligible for vocational rehabilitation services provided with assistance under this part [29 USC §§ 720 et seq.], is made only in full consultation with such individual (or, in appropriate cases, his parents or guardians), and only upon the certification, as an amendment to such written program, or as a part of the specification of reasons for an ineligibility determination, as appropriate, that the preliminary diagnosis or evaluation of rehabilitation potential, as appropriate, has demonstrated beyond any reasonable doubt that such individual is not then capable of achieving such a goal, and (3) any such decision, as an amendment to such written program, shall be reviewed at least annually in accordance with the procedure and criteria established in this section.

(d) Review by Director of determinations by rehabilitation counselor or coordinator; review of final decision of Director by Commissioner.

(1) The Director of any designated State unit shall establish procedures for the review of determinations made by the rehabilitation counselor or coordinator under this section, upon the request of a handicapped individual (or, in appropriate cases, his parents or guardians). Such procedures shall include a requirement that the final decision concerning the review of any such determination be made in writing by the Director. The Director may not delegate his responsibility to make any such final decision to any other officer or employee of the designated State unit.

(2) Any handicapped individual (or, in appropriate cases, his parent or guardian) who is not satisfied with the final decision made under paragraph (1) by the Director of the designated State unit may request the Commissioner to review such decision. Upon such request the Commissioner shall conduct such a review and shall make recommendations to the Director as to the appropriate disposition of the matter. The Commissioner may not delegate his responsibilities under this paragraph to any officer of the Department of Health, Education, and Welfare who is employed at a position below that of an Assistant Secretary.

**APPENDIX B
RCW 74.18.130**

RCW 74.18.130 Vocational rehabilitation—Eligibility. The department shall provide a program of vocational rehabilitation to assist blind persons to overcome vocational handicaps and to develop skills necessary for self-support and self-care. Applicants eligible for vocational rehabilitation services shall be persons who are blind as defined in RCW 74.18.020 and who also (1) have no vision or limited vision which constitutes or results in a substantial handicap to employment and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability.

APPENDIX C
34 CFR §§ 361.32, 361.33,
361.39, 361.40 and 361.41

§ 361.32 Evaluation of vocational rehabilitation potential: Preliminary diagnostic study.

(a) *Basic conditions.* The State plan must assure that, in order to determine whether any individual is eligible for vocational rehabilitation services, there is a preliminary diagnostic study to determine:

(1) Whether the individual has a physical or mental disability which for that individual constitutes or results in a substantial handicap to employment; and

(2) Whether vocational rehabilitation services may reasonably be expected to benefit the individual in terms of employability, or whether an extended evaluation of vocational rehabilitation potential is necessary to make this determination.

(b) *Scope of diagnostic study.* The State plan must assure that the preliminary diagnostic study includes examinations and diagnostic studies to make the determinations specified in paragraph (a) of this section. In all cases, the evaluation places primary emphasis upon determining the individual's potential for achieving a vocational goal.

(c) *Specific evaluations.* The State plan must also assure that the preliminary diagnostic study includes an appraisal of the current general health status of the individual based, to the maximum extent possible, on available medical information. The State plan must further assure that in all cases of mental or emotional disorder, an examination is provided by a physician skilled in the diagnosis and treatment of such disorders, or by a psychologist licensed or certified in accordance with State laws and regulations, in those States where laws and regulations pertaining to the practice of psychology have been established.

§ 361.33 Evaluation of vocational rehabilitation potential: Thorough diagnostic study.

(a) *General provision.* The State plan must assure that, as appropriate in each case, when an individual's eligibility for vocational rehabilitation services has been determined, there is a thorough diagnostic study to determine the nature and scope of services needed by the individual. This study consists of a comprehensive evaluation of pertinent medical, psychological, vocational, educational, and other factors relating to the individual's handicap to employment and rehabilitation needs.

(b) *Scope of thorough diagnostic study.* The thorough diagnostic study includes in all cases to the degree needed, an appraisal of the individual's personality, intelligence level, educational achievement, work experience, personal, vocational, and social adjustment, employment opportunities, and other pertinent data helpful in determining the nature and scope of services needed. The study also includes, as appropriate for each individual, an appraisal of the individual's patterns of work behavior, ability to acquire occupational skill and capacity for successful job performance.

§ 361.39 The case record for the individual.

The State Plan must assure that the designated State unit maintains for each applicant for, and recipient of, vocational rehabilitation services a case record which includes, to the extent pertinent, the following information:

(a) Documentation concerning the preliminary diagnostic study supporting the determination of eligibility, the need for an extended evaluation of vocational rehabilitation potential, and, as appropriate, documentation concerning the thorough diagnostic study supporting the nature and scope of vocational rehabilitation services to be provided;

(b) In the case of an individual who has applied for vocational rehabilitation services and has been determined to be ineligible, documentation specifying the reasons for the

ineligibility determination, and noting a review of the ineligibility determination carried out not later than twelve months after the determination was made;

(c) Documentation supporting any determination that the handicapped individual is a severely handicapped individual;

(d) Documentation as to periodic assessment of the individual during an extended evaluation of vocational rehabilitation potential;

(e) An individualized written rehabilitation program as developed under § 361.40 and § 361.41 and any amendments to the program;

(f) In the event that physical and mental restoration services are provided, documentation supporting the determination that the clinical status of the handicapped individual is stable or slowly progressive unless the individual is being provided an extended evaluation of rehabilitation potential;

(g) Documentation supporting any decision to provide services to family members;

(h) Documentation relating to the participation by the handicapped individual in the cost of any vocational rehabilitation services if the State unit elects to condition the provision of services on the financial need of the individual;

(i) Documentation relating to the eligibility of the individual for any similar benefits, and the use of any similar benefits;

(j) Documentation that the individual has been advised of the confidentiality of all information pertaining to his case, and documentation and other material concerning any information released about the handicapped individual with his or her written consent;

(k) Documentation as to the reason for closing the case including the individual's employment status and, if determined to be rehabilitated, the basis on which the employment was determined to be suitable;

(l) Documentation of any plans to provide post-employment services after the employment objective has been

achieved, the basis on which these plans were developed, and a description of the services provided and the outcomes achieved;

(m) Documentation concerning any action and decision involving the handicapped individual's request for an administrative review of agency action or fair hearing under § 361.48; and

(n) In the case of an individual who has been provided vocational rehabilitation services under an individualized written program but who has been determined after the initiation of these services to be no longer capable of achieving a vocational goal, documentation of any reviews of this determination in accordance with § 361.40(d).

§ 361.40 The individualized written rehabilitation program: Procedures.

(a) *General Provisions.* The State plan must assure that an individualized written rehabilitation program is initiated and periodically updated for each eligible individual and for each individual being provided services under an extended evaluation to determine rehabilitation potential. The State plan must also assure that vocational rehabilitation services are provided in accordance with the written program. The individualized written rehabilitation program must be developed jointly by the designated State unit staff member and the handicapped individual or, as appropriate, his or her parent, guardian or other representative. The State unit must provide a copy of the written program, and any amendments, to the handicapped individual or, as appropriate, his or her parent, guardian, or other representative and must advise each handicapped individual, or his or her representative of all State unit procedures and requirements affecting the development and review of individualized written rehabilitation programs.

(b) *Initiation of program.* The individualized written rehabilitation program must be initiated after certification of eligibility under § 361.35(a) or certification for extended

evaluation to determine rehabilitation potential under § 361.35(b).

(c) *Review.* The State must assure that the individualized written program will be reviewed as often as necessary but at least on an annual basis. Each handicapped individual, or, as appropriate, his or her parent, guardian or other representative must be given an opportunity to review the program and, if necessary, jointly redevelop and agree to its terms.

(d) *Review of ineligibility determination.* The State plan must assure that if services are to be terminated under a written program because of a determination that the handicapped individual is not capable of achieving a vocational goal and is therefore no longer eligible, or if in the case of a handicapped individual who has been provided services under an extended evaluation of vocational rehabilitation potential, services are to be terminated because of a determination that the individual cannot be determined to be eligible, the following conditions and procedures will be met or carried out.

(1) This decision is made only with the full participation of the individual, or, as appropriate, his or her parent, guardian, or other representative, unless the individual has refused to participate, the individual is no longer present in the State or his or her whereabouts are unknown, or his or her medical condition is rapidly progressive or terminal. When the full participation of the individual or a representative of the individual has been secured in making the decision, the views of the individual are recorded in the individualized written rehabilitation program;

(2) The rationale for the ineligibility decision is recorded as an amendment to the individualized written rehabilitation program certifying that the provision of vocational rehabilitation services has demonstrated that the individual is not capable of achieving a vocational goal, and a certification of ineligibility under § 361.35(c) is then executed; and

(3) There will be a periodic review, at least annually, of the ineligibility decision in which the individual is given

opportunity for full consultation in the reconsideration of the decision, except in situations where a periodic review would be precluded because the individual has refused services or has refused a periodic review, the individual is no longer present in the State, his or her whereabouts are unknown, or his or her medical condition is rapidly progressive or terminal. The first review of the ineligibility decision is initiated by the State unit. Any subsequent reviews, however, are undertaken at the request of the individual.

§ 361.41 The individualized written rehabilitation program: Content.

(a) *Scope of content.* The State plan must assure that the individualized written rehabilitation program places primary emphasis on the determination and achievement of a vocational goal, and as appropriate includes, but is not necessarily limited to, statements concerning:

(1) The basis on which the determination of eligibility has been made, or the basis on which a determination has been made that an extended evaluation of vocational rehabilitation potential is necessary to make a determination of eligibility;

(2) The long-range and intermediate rehabilitation objectives established for the individual;

(3) The determination of the specific vocational rehabilitation services to be provided in order to achieve the established rehabilitation objectives;

(4) The projected date for the initiation of each vocational rehabilitation service, and the anticipated duration of each service;

(5) A procedure and schedule for periodic review and evaluation of progress toward achieving rehabilitation objectives based upon objective criteria, and a record of these reviews and evaluations;

(6) The views of the handicapped individual, or, as appropriate, his or her parent, guardian, or other representative, concerning his or her goals and objectives and the vocational rehabilitation services being provided;

(7) The terms and conditions for the provision of vocational rehabilitation services including responsibilities of the handicapped individual in implementing the individualized written rehabilitation program, the extent of client participation in the cost of services if any, the extent to which the individual is eligible for similar benefits under any other programs; and the extent to which these similar benefits have been used;

(8) An assurance that the handicapped individual has been informed of his or her rights and the means by which he or she may express and seek remedy for any dissatisfaction, including the opportunity for an administrative review of State unit action, fair hearing or review by the Secretary under § 361.48;

(9) Where appropriate, assurance that the handicapped individual has been provided a detailed explanation of the availability of the resources within a client assistance project established under Section 112 of the Act;

(10) The basis on which the individual has been determined to be rehabilitated under § 361.43; and

(11) Any plans for the provision of post-employment services after a suitable employment goal has been achieved and the basis on which such plans are developed.

(b) *Coordination with education agencies.* When services are being provided to a handicapped individual who is also eligible for services under the Education for Handicapped Children Act, the individualized written rehabilitation program is prepared in coordination with the appropriate education agency and includes a summary of relevant elements of the individualized education program for that individual.

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON

DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Washington

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I

RESPONDENT HAS GONE OUTSIDE OF THE RECORD TO RAISE NEW ARGUMENTS PREDICATED ON FACTS NOT IN EVIDENCE OR OTHERWISE CONSIDERED BY THE COURTS BELOW.

Making a remarkable about-face from its position taken in the Brief in Opposition to the Petition for a Writ of Certiorari,¹ the Department of Services for the Blind

¹ In the Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, its position was that the state supreme court correctly reasoned from and applied this Court's Establishment Clause decisions. See, Brief in Opposition, at 6-11. Respondent concluded its argument saying: "Under all of the principles enunciated by this court, the state supreme court properly determined that Mr. Witters' request for financial assistance should be denied." *Id.* at 11.

now, in effect, concedes that the Washington Supreme Court's decision on the federal Establishment Clause in this matter was based on erroneous reasoning.² Respondent defends the result below, but abandons the reasoning which led to the result.

Respondent's new arguments, raised for the first time in this Court, are predicated on an essential fact which is nowhere to be found in the record of this case and which no court below considered in any fashion whatsoever.

In respondent's brief at 3 it says:

The vocational rehabilitation program at issue is a federally funded program (Pet. App. C-2, J. App. 7). The federal funding is pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 720, *et seq.*, which provides grants to states "to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." 29 U.S.C. § 720(a).

Nowhere in the record below is it established or even asserted that "the federal funding is pursuant to the Rehabilitation Act of 1973." The source of the federal funding is a factual proposition which must be established by competent evidence and must be included in the record below. Many federal programs exist which share revenues with the states for a variety of educational and social service purposes. There is no proof in the record that the federal money which funded this program is from the Rehabilitation Act of 1973.

² See, e.g., Brief for Respondent at 16-17 where it says: "While we believe the court below was correct in denying the petitioner relief on the basis of the second prong of the *Lemon* test, viz., the "effect" prong, we differ with that court as to the proper approach which should be taken in applying the prong.

We will later demonstrate that even if this fact is somehow properly before this Court, respondent's arguments predicated thereon are without merit. Nonetheless, the belated assertion of this unproven proposition is a ploy to which we take strong exception.

This Court held as early as 1797 that "[i]n some shape, the facts must be made to appear in the record. . . ." *Jennings v. Perserverance*, 3 U.S. (3 Dall.) 336, 337 (1797). Unable to defend the rationale of the decision below, respondent asks this Court to go outside the record despite the fact that "[i]t has been repeatedly ruled in this Court that we can look only to the record to ascertain what was decided in the court below." *Davis v. Packard*, 32 U.S. (7 Pet.) 276, 282 (1833).

The respondent, dissatisfied with the reasoning below, seeks this Court to revise the lower court decision. However, respondent has not built the predicate facts into the record which it claims are essential for the ruling it requests of this Court. The admonition given by this Court in *Suydam v. Williamson*, 61 U.S. (20 How.) 427 (1857) is equally applicable today.

When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequences of his own neglect.

61 U.S. at 433.

The facts which were actually established below and which are in the record are that the program was funded with approximately 80 percent federal funds and 20 percent state funds. J.A. 7. The exact source of those federal

funds is not established in the record. This is no small matter because the respondent attempts to rescue its entire case on procedures which it claims are mandated by the Congressional Act and the federal regulations based thereon.

We do not dispute the existence of the Rehabilitation Act of 1973, nor do we challenge the existence of the regulations promulgated under said Act. However, we do take strong exception to the predicate fact which would give these regulations an arguable relevancy to this case—there is no proof in the record that the federal funds in question are from said Act.

Asserting this matter for the first time at this stage of the proceeding puts petitioner in a terribly unfair position. It also leaves this Court in a difficult situation. We are told what the Act and regulations provide, but there is no opportunity to explore the factual workings of said federal program to gather the necessary evidence to see how the program really works. If respondent would have asserted this factual proposition at a stage of the proceeding which would have allowed petitioner an opportunity to respond, we could have put a great deal of evidence into the record which would, we believe, totally nullify the effect of the respondent's new arguments.³

The Washington Attorney General concedes that he is in a somewhat unusual position by arguing in this Court

³ Even writing this brief puts us in a very difficult position without going outside the record ourselves to meet this new factual assertion and new arguments predicated thereon. We have discovered new evidence which directly undermines the respondent's arguments about how the program really works. We include the gist of this information in this footnote, but we do not ask that this Court consider it as evidence in any way. We include it as a hypothetical example of the kind of evidence which we could possibly have

that his own statute is unconstitutional under the federal Establishment Clause.⁴ However, by its new argument the Attorney General of Washington State now not only says his state statute is unconstitutional, for the first time he now implicitly argues that the federal statute which funds the state program is also unconstitutional.

Respondent concedes that the federal program does not exclude ministerial students from participation therein.⁵ The Attorney General of Washington argues that certain aspects of the federal program require the State of Washington to administer its program in a way that violates the Establishment Clause. Without saying it directly, the State of Washington now is arguing that the federal program, 29 U.S.C. § 720 *et seq.*, is unconstitu-

gathered and introduced if this issue had been properly raised by the respondent early on in this proceeding.

"Hypothetically" we could prove that the State of Florida's Department for the Blind administers a program with funding from the same federal program which the State of Washington claims as its source of federal funds. Again, "hypothetically" we could prove that the Florida program has funded many people to study for the ministry. We could "hypothetically" prove that the Florida program evaluates a blind person's suitability for a course of training in the ministry by simply taking the person's academic record and test scores to the college which the blind person desires to go to and asks the dean to evaluate this person's chance for academic success based upon their experience with persons with similar academic records. This is, at least "hypothetically," the exact same procedure used in evaluating students who want academic training for any other career. Furthermore, in Florida in order to evaluate the prospects of job placement for the ministerial student, we could "hypothetically" prove that the vocational counselor simply asks the college for its record of placement of individuals in that career field, the same criteria used for all other career choices.

⁴ See, Brief of Respondent at 5.

⁵ See, Brief of Respondent at 10.

tional. In order to keep one blind man from participating in a vocational rehabilitation program, the State of Washington Department of Services for the Blind is asking this Court to void a federal program which is apparently working well in the 49 other states.

The United States Department of Justice would have undoubtedly had the right to participate in the factual development of this case to demonstrate the full and true workings of this federal program if there had been any prior notice that the State of Washington intended to challenge the constitutionality of the federal program.

Surely, this kind of a belated, back-door challenge to the constitutionality of an Act of Congress cannot be permitted to be raised for the very first time in a brief of a respondent in this Court.

Petitioner has, from the very first stage, argued that decision to preclude him from participation violated the provisions of the First Amendment to the United States Constitution. He has argued at every stage that if the state constitution is construed to deny him the access to the program, then the state constitution is in violation of the federal constitution. The Attorney General of Washington surely should be charged with the foresight that a person who raises such arguments may eventually seek to have his case adjudicated in this Court. The Attorney General should not now be permitted to complain that the case has taken unexpected twists and turns which necessitate raising new evidence, new arguments, and a new *sub silentio* challenge to the constitutionality of a federal statute. The record has been made. It is too late for this type of tactic.⁶

⁶ We also take strong exception to the effort of the Anti-Defamation League of B'nai B'rith to go outside the record to supplement the facts to bolster its arguments. A letter of May 16, 1985,

II

EVEN IF RESPONDENT IS ABLE TO RAISE NEW ARGUMENTS ON NEW FACTS, THEY ARE WITHOUT MERIT

A. Respondent's New Arguments Give No Basis For Determining That The Primary Effect Of The Program Is To Advance Religion.

Respondent takes several pages of its argument to expound for the first time upon the "Nature of the Vocational Rehabilitation Program for the Blind." See, Brief of Respondent, at 10-16.⁷

Assuming that this line of argument is somehow properly before this Court, the arguments which are derived from this newly expanded factual base still fail to demonstrate any constitutional prohibition against a

from David R. Minikel, Counsel for the Washington Department of Services for the Blind, to the Anti-Defamation League is appended to the ADL brief. The ADL then uses language from that letter to assert the "fact"—not in the record—that the aid directly flows to Inland Empire School of the Bible rather than to Mr. Witters. This kind of self-serving manipulation of the record should not be countenanced. The ADL brief should be ignored if not stricken.

⁷ Respondent ends this section with a caustic comment that "petitioner fail[s] to comprehend the nature of the program. . . ." See, Brief of Respondent, fn. 9, p. 16. Our arguments which give rise to this critique are totally accurate based upon the record of the case. Our "failure to comprehend" is due solely to the fact that we have chosen to rely on the record of this case. Based upon that record, it is without dispute that our original brief was absolutely correct when we said: "The choices as to which school to attend and which career to pursue are entirely up to the blind individual. No agency of the state has the power to influence that choice." Petitioner's Brief at 20. Respondent has been in a superior position all along to know the "true" nature of the program. Respondent cannot be allowed to withhold such information until it suits its purpose to dole out another bit of information concerning the "nature of the program." The state is trying to play a shell game with a blind man.

blind ministerial student participating in the federally funded, state administered program.

Respondent places its primary reliance for its "primary effect" argument, not on decisions of this Court, but on the theories of Harvard's Professor Laurence Tribe as expressed in his 1978 textbook for law students on constitutional law. See, Brief of Respondent at 17, citing Tribe, *American Constitutional Law* (1978). According to the seven-year-old passage cited from Professor Tribe, this Court's position has "shifted" from the language of *Lemon*, and has "come closer to the absolutist no-aid approach to the establishment clause than the primary effect test did." *Id.*, Tribe at p. 840.

It is fair to wonder if even Professor Tribe still believes that this Court has embraced the "absolutist" position in light of its decisions in *Lynch v. Donnelly*, — U.S. —, 79 L.Ed.2d 604 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); and *Mueller v. Allen*, 463 U.S. 388 (1983). Certainly this Court has demonstrated that it does not read the Constitution in an "absolutist" manner with regard to the Establishment Clause.

Respondent suggests that by the state involvement in counseling a blind individual on a possible career choice as a minister, the "imprimatur of state approval" comes to rest on the blind person's career, thereby violating the "primary effect" test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The record discloses no such factual pattern in this case. Who chose a ministerial career for Witters? He did. Who chose the school in question? He did. It strains the imagination to believe that any state counselor would actually initiate a suggestion that a blind person might become a minister. Although, the allegedly applicable federal program requires state cooperation and approval

of the choice of career, it is no different than the kind of government approval involved in approving a church's building permit.

A government building permit administrator might have to involve himself in discussions about how many pews are going to be located in sanctuary. The government agent might have to advise the church on where to place its baptistry to avoid a potential safety problem. The government agent might even have to be involved in deciding whether a congregation can even build a church building at all on the property in question because of zoning laws.

Does the government's approval of a church's choice of pews, location of a baptistry, or its decision to build represent an impermissible "imprimatur" of government approval on that church? We think not.

The role of the counselor in this case is no different. As to the qualifications of the person for the ministry, the counselor can apply an objective, secular standard, to wit; "Does the person have the academic background which would predict success with this level of college education?" This could be done by comparing the would-be ministerial student's grades and test scores with others who have been admitted for similar training. This is no different than what is done for a blind person who wants to be a teacher or lawyer.

Just as a government building inspector uses objective, secular criteria to evaluate both church sanctuaries and civic auditoriums, so too, a vocational counselor may use similar objective, secular criteria to evaluate potential ministers, teachers, and lawyers.

There is no "religious" choice to be made by the government counselor. His sole objective is to determine if the person has the academic prowess to succeed in the pro-

posed course of study. There are no religious decisions to be made by the counselor which "inhere in the situation" as suggested by respondent.

The same is true as to the assessment of the availability of employment for ministers. Surely it is not unconstitutional for the Department of Labor to gather statistical data on the number of persons employed in religious careers. Does the imprimatur of government approval rest on religion when the government gathers such information? Not even Professor Tribe would argue that. If it is not impermissible to gather employment statistics for persons in religious careers, why is it impermissible for a vocational counselor to look at such information to find out how many jobs in that category exist in his state? What is unconstitutional about a government counselor going to a church college and asking for statistical information about the placement record of the school for students who desire to become ministers? It is no different than asking a church for information on the number of persons in church on Sunday to measure the adequacy of building exits or parking spaces.

It does not violate the Establishment Clause for a government agent to merely talk to a church-related institution about wholly secular data. No imprimatur of state approval results from a government agent's approval of either a church building plan or a blind man's career plan.

B. Respondent's New Evidence And New Arguments Do Not Demonstrate Excessive Entanglement Of The State With The Church.

The new arguments raised by respondent are more properly dealt with under the "excessive entanglement" prong of the *Lemon* tri-partite test than under the "primary effect" test. However, the failure of respondent to

build his record to demonstrate the unconstitutionality of the program under this prong was specifically pointed out by the Washington Supreme Court.

The three-pronged "entanglement" inquiry is ill-suited to this case. In addition, the administrative and trial court records do not provide an adequate factual basis to make the type of inquiry contemplated by the Supreme Court.

C.P. A-12.

Who had the duty to put such factual information in the record? The party who wished to argue that the program was unconstitutional. Witters has argued all along that his participation is not barred by either the state or federal constitution. It was up to the Attorney General of Washington to build such a factual record if he wished to make such an argument.

In any event, the analysis we have just made with respect to the "imprimatur" of state-approval applies with equal force to the state's "new and improved" excessive entanglement argument.

The posture of the respondent is that any involvement of the state with a religious institution *ipso facto* constitutes excessive entanglement of the state with the church. The state is no more entangled with a religious institution in this kind of situation than it is, as we have argued, when it considers and approves church building permits.

However, even with new facts and new arguments respondent fails to come to grips with the fact that in this case the state is not entangled at all with religious institutions. The state's involvement is with Witters, not a religious institution. There is no "excessive entanglement" holding ever entered by this Court where a pro-

gram was ruled unconstitutional because the government became too entangled with a religious individual.

Ministers are allowed certain tax advantages under the Internal Revenue Code. Does it constitute excessive entanglement by the IRS to gather information from a person claiming the right to such treatment to ascertain that he is indeed a minister and that his actual employment is of a religious nature? It has never been so held by this Court. Interaction between the government and a religious individual has never been considered to violate the excessive entanglement prong or any other prong of the Establishment Clause test as interpreted by this Court.

This long-standing practice of government interaction with ministers under the IRS Code is clearly a more comparable situation to this case than the facts in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). In that case this Court held that granting a church absolute veto power over a liquor license gave the church, in essence, the right to make a governmental decision. In this case no religious institution has any power to make a governmental decision. Nor does the state have the power to make a religious decision. The decision which the state has to make is simply: Will this person become employed if he pursues the career he has chosen? There is nothing religious or entangling about such a determination.

III

THERE IS NO REASON THIS COURT SHOULD AVOID THE FREE EXERCISE ISSUE

There is one point about which petitioner and respondent agree. Both sides have argued that the Free Exercise issue is ripe at this stage of the proceedings and there is no rationale for remanding this case to the state supreme court.

It is the suggestion of the Solicitor General that such a course of action be pursued. The Solicitor cites no authority to bolster his argument that the case should be remanded for a determination of the state constitutional issues before this Court reaches the Free Exercise Clause issue.

The posture of this case is no different in this regard than that in *Widmar v. Vincent*, 454 U.S. 263 (1981). In that case the argument was raised that the Missouri Constitution required a stricter separation of church and state than was required by the federal Constitution. There was no definitive ruling by the Supreme Court of Missouri that its state constitution actually required the prohibition of religious student groups on its state college campuses. The lack of a determination of the state law issue in *Widmar* was not seen by this Court as a reason to merely vacate the lower court's decision on the Establishment Clause and remand for a decision on the state constitutional issue before deciding the substantive issues under the Free Speech and Free Exercise Clauses.

As in *Widmar*, there is little doubt here as to how the state supreme court would decide the state constitutional issue. The lower court has already said in this case:

Since our state constitution requires a far stricter separation of church and state than the federal constitution (see *Weiss v. Bruno*, 82 Wn. 2d 199, 509 P.2d 973 (1973)), it is unnecessary to address the constitutionality of the aid under our state constitution.

C.P. at A-2.

The practice followed by this Court in *Widmar* should be applied again to this case. The Court took the word of the attorneys for the State that the state constitution would preclude the students' right to equal access on the college campus. This was especially appropriate in light of

the prior decisions of the Missouri supreme court which seemed to signal such a result.

We have a much clearer signal here. If the state supreme court did not decide that the state constitution would preclude aid to Witters, they dropped an anvil-like hint to that effect.

There is no prudential reason for delaying a decision on the free exercise issue. A remand would not serve any notion of judicial economy for it is a virtual certainty that the decision on remand will only require this Court to consider it all again in a year or two.

Meanwhile, it should be noted that the respondent correctly points out that Witters is legally blind from a progressive eye disease which is expected to result in total blindness. At this point he can still see enough to read, making his training much easier and much less costly for the state. If this case must go back for a remand his situation might not permit such a possibility a year or two from now.

IV

PETITIONER'S FREE EXERCISE RIGHTS ARE VIOLATED IF HIS RELIGIOUS CAREER DISQUALIFIES HIM FROM A PROGRAM FOR WHICH HE IS STATUTORILY ELIGIBLE

Respondent's argument on the Free Exercise Clause is easily answered. Respondent contends that this situation is analogous to *Harris v. McRae*, 448 U.S. 297 (1980). In that case certain persons claimed that their constitutional right to choose an abortion was denied by a legislative determination by Congress not to fund certain types of abortion procedures under Medicaid programs. This Court held that the constitutional right to choose an abortion did not give rise to an auxiliary right to require the

government to pay for it when the legislative body had not chosen to fund it.

That is simply not the situation here. We admitted in our opening brief that this case would be substantially more difficult if the Washington legislature had chosen to exclude ministerial students from participation in the program. Respondent concedes, as it must, that neither the state legislature nor Congress decided to exclude ministerial students from eligibility in this program.

The legislative judgment here was to include Witters. We do not argue on these facts that the legislature must be required to fund Witters program against its will by virtue of the Free Exercise Clause.⁸

This Court said in *Thomas v. Review Board*, 450 U.S. 707, 716 (1981) that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available government program." Thomas may not have had a constitutional right to unemployment compensation if the legislature had not decided to enact such a program, but once they did enact such a program, he could not be excluded solely because of his exercise of his religion. Witters may not have a constitutional right to government funding of vocational rehabilitation if the legislature did not enact such a program which made him eligible, but like Thomas, he may not be excluded by the courts simply because of the exercise of his First Amendment right to exercise his religious faith by studying for the ministry.

⁸ We question whether the state legislature would be allowed to make such a judgment under the federal Supremacy Clause given the fact that the program is federally funded at least 80 percent. Congress did not exclude ministerial students. This Court need not speculate on the outcome of a case where Congress authorized such funding and the state legislature decide to exclude ministerial students. Here Congress and the state legislature are in agreement.

CONCLUSION

Petitioner respectfully prays that this Court reverse the decision of the Washington Supreme Court which held that the federal Establishment Clause prohibits his participation in the vocational rehabilitation program. Petitioner further prays that this Court rule that his right to the Free Exercise of Religion has been violated by his exclusion from the rehabilitation program, since he met the statutory criteria for participation.

Respectfully submitted,

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October 30, 1985

CERTIFICATE OF SERVICE

MICHAEL P. FARRIS, counsel of record for petitioner, hereby certifies that he sent three copies of the foregoing Petitioner's Reply Brief to counsel of record for Respondent, Kenneth O. Eikenberry, Attorney General, Philip H. Austin, Senior Deputy Attorney General, Timothy R. Malone, David R. Minikel, Assistant Attorney General, Temple of Justice, Olympia, Washington, 98504, by Federal Express next day delivery on this 30th day of October, 1985. I further certify that I sent one copy of said brief by regular first class mail to each of the following counsel of record for Amici Curiae for both sides:

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In the Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS, PETITIONER

v.

WASHINGTON DEPARTMENT OF SERVICES
FOR THE BLIND

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether the Establishment Clause requires a State to deny financial assistance for the education of a blind person who is otherwise eligible for such assistance under the State's vocational rehabilitation program solely because the handicapped applicant intends to use that assistance to study for a church-oriented career.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1070

LARRY WITTERS, PETITIONER

v.

WASHINGTON DEPARTMENT OF SERVICES
FOR THE BLIND

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the Washington State Department of Services for the Blind's denial of vocational rehabilitation benefits to petitioner Larry Witters, a blind person who is otherwise eligible to receive such benefits from the State, solely because of his intention to use those benefits to pursue a college-level curriculum that would prepare him for a church-oriented career. The Department's decision was upheld by the Supreme Court of the State of Washington on the ground that to grant petitioner benefits under these circumstances would violate the Estab-

lishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. Noting that petitioner is not "pursuing a secular course of study with the personal objective of becoming a minister," but that the curriculum for his course of study "includes classes in Old and New Testament studies and church administration" (Pet. App. A10), the court held that "[i]t is not the role of the state to pay for the religious education of future ministers" (*ibid.*).

The interest of the United States in the matter arises because under several major federal programs of long standing, administered by the Veterans' Administration and the Department of Education, the federal government provides financial assistance to students pursuing higher education in preparation for church-oriented careers. The position of the United States, as expressed by Congress in the statute establishing one of these programs, is that the proper governmental criterion is whether the course of study will assist the beneficiary "in attaining *an educational, professional, or vocational objective* at any educational institution * * * selected by the [beneficiary], which will accept and retain the [beneficiary] as a student or trainee *in any field or branch of knowledge* which such institution finds the [beneficiary] qualified to undertake or pursue." 38 U.S.C. 1670 (emphasis added). It is not the role of the government, under these programs, to condition the availability of these benefits on the student's selection of a secular career.

The Veterans' Administration (VA) administers a widely-known educational assistance program, popularly called the "GI Bill," and similar programs under which the government provides directly to quali-

fied veterans or dependents a sum of money to be used at their discretion for subsistence, tuition, and other costs of obtaining higher education. See 38 U.S.C. 1500-1521, 1601-1643, 1651-1693, and 1700-1766.¹ In each of these programs, the beneficiary is permitted to select his own school and course of study from among courses and institutions approved for VA purposes by state approving agencies. See 38 U.S.C. 1770-1780; 38 C.F.R. 21.4200-21.4280. The VA is prohibited by law from exercising any supervision or control over either the educational institutions or the state approving agencies involved. 38 U.S.C. 1782. The Veterans' Administration has long provided educational benefits to students pursuing a recognized educational objective that may lead to the ministry. See, *e.g.*, Department of Veterans Benefits Information Bulletin, IB 7-76, at 5 (1954); Program Guide § M-25, at 21-1 (July 2, 1980).

The Department of Education also administers major programs under which higher education students receive grants or loans to defray the costs of education at institutions of their choice, in preparation for careers of their choice. See 20 U.S.C. 1070a, 34 C.F.R. Pt. 690 (Pell Grant program); 20 U.S.C.

¹ In addition, the VA administers a program under 38 U.S.C. 1500-1521, which provides support to veterans with substantial service-related disabilities, including blindness, by financing training, employment, and medical and sociological services. Under this program, unlike those discussed in text, the VA may itself select and approve the training facility, and it pays the costs of tuition, fees, books, and other related items directly to the facility; subsistence payments are made directly to the veteran. As under the other programs, however, benefits under 38 U.S.C. 1500-1521 may be used for study in religiously-affiliated institutions and for courses of study leading to church-oriented careers.

1070b *et seq.*, 34 C.F.R. Pt. 676 (Supplemental Educational Opportunity Grant program); 20 U.S.C. 1070c *et seq.*, 34 C.F.R. Pt. 692 (State Student Incentive Grant program); 20 U.S.C. 1071 *et seq.*, 34 C.F.R. Pt. 682 (Guaranteed Student Loan program); 20 U.S.C. 1078-2, 34 C.F.R. Pt. 683 (Parent Loans for Undergraduate Students program); 20 U.S.C. 1087aa *et seq.*, 34 C.F.R. Pt. 674 (National Direct Student Loan program); 42 U.S.C. 2751 *et seq.*, 34 C.F.R. Pt. 675 (College Work-Study and Job Location and Development program). Under each of these programs, the student may attend essentially any institution of higher education accredited by a recognized national or state accrediting agency. See 34 C.F.R. 668.2(a)(5). There is no prohibition in these programs against a student using the federal financial assistance to attend a divinity school or a similar school to train to be a minister, and students have used federal assistance for these purposes. Indeed, among the recognized national accrediting agencies are the American Association of Bible Colleges, the Rabbinical and Talmudic Education Association of Advanced Rabbinical and Talmudic Schools, and the Association of Theological Schools in the United States and Canada. 49 Fed. Reg. 1275-1277 (1984).

The vocational rehabilitation program at issue here is itself a federally assisted program (Pet. App. C2). Although the record does not so reveal, the program would appear to be funded under the Rehabilitation Act of 1973, 29 U.S.C. 720 *et seq.*, which provides grants to states "to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities" (29 U.S.C. 720(a)). Under this program, a designated

state agency prepares and implements a plan for the provision of services in accordance with the statutory purposes and federal program requirements. Respondent Washington State Department of Services for the Blind is a designated state agency eligible to receive funds under this program, and has chosen to use at least a portion of the funds to provide financial assistance to eligible persons for vocational training. Whether petitioner satisfies the federal eligibility requirements has not been addressed in this litigation, and we express no view on the matter. It is the view of the Department of Education, however, that—insofar as federal law is concerned—assistance to individual handicapped persons under this program may be used for any course of study that will promote the goal of preparing the person for gainful employment, without restriction to secular employment. See note 11, *infra*.

The decision of the court below, if not reversed, would therefore have a substantial impact on major federal programs, including the program under which this case apparently arose. The United States has a compelling interest in presenting its views in this case, toward the end of ensuring that GI Bill and other educational benefits continue to be provided to students on a neutral basis, without distinctions on the basis of religious content or the religious character of the student's choice of career.

STATEMENT

Petitioner Larry Witters, a college student, is blind. He is eligible for vocational assistance under Wash. Rev. Code Ann. § 74.16.181 (1982) (Pet. App. A2-A3, C2), revised and recodified in pertinent part as Wash. Rev. Code Ann. §§ 74.18.130, 74.18.140 (Supp. 1985), which established a vocational rehabili-

tation program administered by respondent, the State Department of Services for the Blind,² and funded by a combination of federal (80%) and state (20%) monies (Pet. App. C2). Petitioner was enrolled in a three-year Bible diploma course at the Inland Empire School of the Bible in Spokane, Washington—a private, nondenominational Christian college (Pet. 6)—when he first sought financial assistance from the Department (Pet. App. A3, C2-C3). He later changed to a four-year program that would also lead to a bachelor of arts degree from Whitworth College (*id.* at A3, C3), a private, accredited Presbyterian school (Pet. 6).³ Petitioner's purpose in pursuing this course of study was to prepare himself for a position as a pastor, missionary, or church youth director (Pet. App. A1-A2, A9, C3). The curriculum for this course of study included classes in the Bible, church administration, ethics, and speech (*id.* at A10, C3-C4).

Respondent Department of Services for the Blind denied petitioner's application for financial assistance because of its view that "[t]he Washington Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in

² The Department of Services for the Blind was formerly called the Commission for the Blind, and is so denominated in the opinions below. See Pet. App. A1 n.1.

³ We are informed by the Department of Education and the Veterans' Administration that Whitworth College is a participating institution under student aid programs administered by the Department and has been approved for GI Bill purposes as an institution of higher learning. Courses at the Inland Empire School of Bible have been approved for GI Bill purposes as non-college degree courses, but the School does not have a participation agreement with the Department of Education. (This does not mean that the School is ineligible; it may have chosen not to participate.)

theology or related areas' " (Pet. App. C4, quoting Department policy statement; see also *id.* at A2). Respondent's denial was upheld on administrative review (*id.* at E1-E8, F1-F7) as well as on judicial review in the state Superior Court (*id.* at C1-C9, D1-D37). Petitioner then appealed to the state Court of Appeals, which certified the case to the state Supreme Court. At each stage in the litigation, respondent based its position on the state constitution, and at no stage in the litigation did respondent contend that to grant the benefits to petitioner would violate the federal constitution.

The Supreme Court of the State of Washington, by a divided vote, affirmed respondent's decision to deny financial assistance to petitioner, but the court based its decision on the Establishment Clause of the First Amendment—not on the state constitution (Pet. App. A2). Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), the state Supreme Court concluded, first, that the state vocational assistance program had a secular purpose. The court held that the purpose stated in Wash. Rev. Code Ann. § 74.16.181 (1982)—"to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care"—demonstrates that "this statute has a valid secular legislative purpose" (Pet. App. A7). Turning to the second part of the *Lemon* test, however, the court concluded that "the principal or primary effect of the aid sought by [petitioner] would be to advance religion" (Pet. App. A10). It reached this conclusion by focusing "on the particular aid sought by the [petitioner]" rather than on the vocational rehabilitation program as a whole (*id.* at A8). Finally,

the court concluded that the record did not provide an "adequate factual basis" for determining whether the provision of aid to petitioner would entail "excessive entanglement," and that the "'entanglement' inquiry is ill-suited to this case" (*id.* at A12).

In addition, the court below rejected petitioner's claim that the denial of assistance under these circumstances infringed his rights under the Free Exercise Clause of the First Amendment (Pet. App. A14-A16) and indicated that it was unnecessary to address his Fourteenth Amendment Equal Protection Clause claim (Pet. App. A16-A17).

SUMMARY OF ARGUMENT

The federal government has long provided financial assistance, in the form of scholarships, grants, loans, and work-study jobs, to students in higher education, and has permitted them to choose (from among a diverse and compendious list of institutions accredited on a neutral educational basis) their place of study and vocational objective. Some students (we know not how many) have used this assistance to obtain training for a religious career. The Supreme Court of the State of Washington, however, has held that the Establishment Clause requires the government to exclude such students from assistance programs otherwise available. According to the court, it is not the proper "role" of government to pay for the "religious education of future ministers" (Pet. App. A10).

We submit that this decision is erroneous. The constitutionality of a neutral program of assistance to a broad class of beneficiaries, selected without regard to religion, has never been questioned by this Court. Nor should it be. The consequence of the holding of

the Washington court would be to require the government to single out religious practice for disfavored status, to deny individuals equal treatment under government assistance programs for no reason other than their intended religious vocation. It would convert the First Amendment into an instrument of hostility to religion, rather than a protector of free religious exercise; an instrument of secular conformity, rather than a catalyst for greater diversity, pluralism, and individual choice.

The history of the adoption and early interpretation of the Establishment Clause shows that the original intention was not to deprive religion or religious individuals of benefits bestowed by the government. Rather, the framers intended the First Amendment to guarantee religious liberty by preventing the federal government from placing its imprimatur of approval on any particular religious sect or sects. The early practice in the area of government-supported education is particularly instructive: both Congress and the states frequently provided assistance to schools, whether they were public or private, religious or nonreligious.

Recent decisions of this Court have found many forms of direct assistance to religious *institutions*, including schools, troublesome because of the twin problems of avoiding an appearance of government endorsement of or involvement with the religious denomination involved and preventing intrusive methods of avoiding such appearances. No hard and fast rules have evolved in this difficult area. However, when government assistance has been provided not to the institutions, but to individual students and their parents, this Court has concluded that—so long as the assistance is provided neutrally to a broad spec-

trum of citizens—it is “not readily subject to challenge under the Establishment Clause.” *Mueller v. Allen*, 463 U.S. 388, 399 (1983). The instant case falls into this latter category. The aid is provided not to religious institutions, but to a broad class of persons (the blind), selected on a neutral basis, without regard to religion. Under this Court’s precedents, the Washington vocational rehabilitation program is constitutional.

The principal error of the Washington Supreme Court was in evaluating the “primary effect” of the rehabilitation program on the basis of this particular instance—the requested aid for petitioner Witters to study for the ministry—rather than looking to the program as a whole. Such an approach inevitably leads to a conclusion that the effect is predominantly religious; it makes a neutral program appear partial. Evaluated in its full context, the program neither advances nor inhibits religious practice. The Establishment Clause holding of the Washington Supreme Court should therefore be reversed.

Other questions raised in the petition are premature. The only issue addressed by the Washington Supreme Court was the federal Establishment Clause; state law issues remain to be decided. Although, as petitioner points out, adverse decisions on those state law issues could well give rise to further federal constitutional questions (and federal statutory questions as well), this Court should not reach out to decide those questions in the present posture of the case.

ARGUMENT

THE ESTABLISHMENT CLAUSE DOES NOT PREVENT A STATE FROM PROVIDING VOCATIONAL REHABILITATION BENEFITS TO A BLIND COLLEGE STUDENT ELIGIBLE UNDER RELIGIOUSLY NEUTRAL CRITERIA WHERE THE STUDENT INTENDS TO USE THOSE BENEFITS TO PURSUE A CHURCH-ORIENTED CAREER

Respondent, the Washington State Department of Services for the Blind, with federal financial assistance, has embarked on a program of assisting blind persons “to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care.” Wash. Rev. Code Ann. § 74.16.181 (1982). Respondent provides, among other forms of assistance, tuition reimbursement for vocational education. The choice of vocation, and the choice of educational institution, is left to the individuals involved.

Petitioner Witters is blind, and it is undisputed that he is eligible for assistance under this program. He has chosen to study for a career as a pastor, missionary, or religious education director. It is not contended that such a career falls outside the purposes for which the Washington program is established; a career in the ministry would enable petitioner to overcome vocational handicaps and to support himself. Nonetheless, petitioner has been denied the benefits to which he is entitled under the program. The sole reason for the denial of these benefits, under the holding of the state Supreme Court, is that to grant them would violate the Establishment Clause of the First Amendment.

We believe that the court below has committed a basic analytical error in its application of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971),

to the facts of this case. We will discuss that error in detail below. But first, we wish to stand back from the detailed doctrinal analysis of this case to pose the fundamental question: whether, "in reality," the provision of educational assistance to a blind college student choosing to pursue a church-oriented career, in common with other handicapped persons pursuing careers of their choice, "establishes a religion or religious faith, or tends to do so." *Lynch v. Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8-9.

A. The History Surrounding The Enactment And Early Interpretation Of The Establishment Clause Demonstrates That Neutral Assistance To Education Is Not Unconstitutional

James Madison, author of the draft of the Establishment Clause first introduced in Congress, explained on the floor of the House of Representatives that "the object it was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." 1 Annals of Cong. 731 (J. Gales ed. 1789).⁴ Almost fifty years later,

⁴ Madison's famous *Memorial and Remonstrance* (see *Everson v. Board of Education*, 330 U.S. 1, 12 (1947)) is not to the contrary. The subject of the *Memorial and Remonstrance* was a proposal before the state legislature to make "provision for Teachers of the Christian Religion" (*Memorial and Remonstrance*, reprinted in full at 330 U.S. at 63-72 (emphasis supplied)), which Madison understood as a preference for "Christianity, in exclusion of all other Religions" (*id.* at 65). Central to Madison's argument in the *Memorial and Remonstrance* is that the proposal "violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions" (*id.* at 66). The vice

Joseph Story, perhaps the leading commentator on the Constitution in the early days of the Republic, explained in a similar vein, "The real object of the [First] Amendment was * * * to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 3 J. Story, *Commentaries on the Constitution of the United States* 728 (1833), quoted in *Lynch v. Donnelly*, slip op. 9. Similar interpretations were offered during this period by a unanimous Supreme Court in *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 48-49 (1815) (concerning the Virginia disestablishment), and the Judiciary Committee of the Senate in S. Rep. 376, 32d Cong., 1st Sess. 1 (1853).

The Establishment Clause was not thought to prohibit neutral aid to education, religious as well as nonreligious. During the first half century under the Constitution, Congress frequently made land grants for the support of education, including schools op-

in the proposal, in other words, was that it preferred one religion over the others.

The weight of the historical evidence indicates that the *Memorial and Remonstrance* reflects a more strictly separatist view than that espoused by Madison in Congress in connection with the Establishment Clause (which he in fact deemed unnecessary (1 Annals of Cong., *supra*, at 758)), and that Madison's views, in turn, were more radical on this issue than Congress and the States were willing to accept (hence the compromise language of the First Amendment). See, e.g., C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment* 126-142, 197-198 (1964); M. Malbin, *Religion and Politics* 16-17 (1978); see also R. Cord, *Separation of Church and State* 20-36 (1982). Nonetheless, nondiscriminatory aid of the sort at issue here is consistent even with the views expressed in the *Memorial and Remonstrance*.

erated by religious denominations.⁵ See C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment* 163-164 (1964). Congress made grants of land in 1832 and 1833 to two denominational colleges in the District of Columbia—Columbia College and Georgetown College. Not until 1845 did Congress, for the first time, limit the use of land set aside for schools to “public schools.” *Ibid.* States having disestablishment laws of their own similarly supported religious as well as nonreligious education. *Id.* at 165, 168. One historian has commented that “it was a very common thing indeed for the civil authorities in the states which pretended to give free education only to pauper children, to pay the tuition of such children in denominational schools.” E. Reiser, *Nationalism and Education Since 1789*, at 364 (1922). The overriding principle was (in this Court’s later words) that “one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The fear of a “national ecclesiastical establishment” may be remote at this juncture in our history; however, it is as vital today as it was at the founding to ensure that the power, resources, and prestige of the government not be turned to the services of a religious sect or combination of sects. The point of the Establishment Clause is not to exclude religious institutions or individuals from the benefits our society provides, but to guarantee that the government does not confer the “imprimatur of State approval” on any particular religion, or on religion generally.

⁵ Indeed, one of the reasons stated for land grants for educational purposes was to provide support for “[r]eligion, morality, and knowledge.” See Northwest Ordinance, ch. VIII, art. III, 1 Stat. 52.

Mueller v. Allen, 463 U.S. at 399; *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); see *Lynch v. Donnelly*, No. 82-1256 (Mar. 5, 1984) (O’Connor, J., concurring).⁶ As the Court stated in *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), the “basic purpose” of the Religion Clauses “is to insure that no religion be sponsored or favored, none commanded, and none inhibited.”

To allow individuals to receive the benefit of facially neutral government programs, even where the individuals have a religious purpose or calling, does not signal government approval for their religion, but shows a wholesome “benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.” *Walz*, 397 U.S. at 669; see *McDaniel v. Paty*, 435 U.S. 618, 638-639 (1978) (Brennan, J., concurring). It no more “advances” the cause of a religion to assist petitioner Witters, like other handicapped citizens of the State of Washington, to obtain training for the career of his choice than it does to accord police and fire protection to

⁶ Government nonetheless may accommodate or facilitate the practice of religion in ways not equally applied to non-religious activities. So long as such accommodations are neutral among religions, neither induce nor coerce religious beliefs, and are administered in a way that does not interfere with the autonomy of religious institutions, they are constitutional. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Gillette v. United States*, 401 U.S. 437 (1971); *Zorach v. Clauson*, 343 U.S. 306 (1952). Such accommodations do not establish a religion, but—in keeping with the special status of religion in the Constitution itself—accord special treatment to the liberty of religious exercise. See *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). This case involves only equal treatment—not preferential accommodation—of religion.

churches (in common with other buildings), to allow a Bible study group to meet in a public university (in common with other student groups),⁷ or to allow parents to deduct specified expenses of educating their children in religious schools from their taxes (in common with other parents).⁸

On the contrary, to *single out* petitioner Witters' choice of vocation would be to discriminate against religion—to relegate religion to a disfavored position in the public arena. “[W]e must be careful, in protecting the citizens * * * against state-established churches, to be sure that we do not inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief.” *Everson v. Board of Education*, 330 U.S. 1, 16 (1947); see *McDaniel v. Paty*, 435 U.S. at 638 (Brennan, J., concurring).

B. When, For Secular Purposes, The Government Provides Financial Aid To Individuals On a Facially Neutral Basis, The Individuals' Use Of That Aid For Religious Ends Or In Religious Contexts Does Not Constitute An Establishment

One of the most vexing questions in constitutional law has been when and under what terms religious *institutions* may participate in or benefit from public programs of general applicability. Although, as the Court stated in *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976), “religious institutions need not be quarantined from public benefits that are neutrally available to all,” some of the Court’s most

⁷ *Widmar v. Vincent*, *supra*; see also *Bender v. Williamsport Area School District*, cert. granted, No. 84-773 (Feb. 19, 1985).

⁸ *Mueller v. Allen*, *supra*.

difficult and controversial decisions have been concerned with how to ensure that government aid provided, for legitimate and secular purposes, to religious institutions is not used to foster their religion. See, e.g., *Lemon v. Kurtzman*, *supra*; *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980). The conflict over aid to parochial elementary and secondary schools has been especially sensitive, because of the particular danger in that context of government aid being understood as contributing to religious indoctrination.

In contrast, the Court has rarely—indeed, only once, and then in circumstances far different from these—found that the Constitution bars neutral financial aid to *individual recipients* merely because they choose to use the aid in religious contexts or for their own religious purposes. It is “noteworthy that all but one of [the Court’s] recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves.” *Mueller v. Allen*, 463 U.S. at 399. The one exception is *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), which involved a government aid program designed exclusively for the benefit of parents with children in nonpublic schools, rather than a general program for the benefit of all schoolchildren.⁹

⁹ See also *Lemon v. Kurtzman*, 403 U.S. at 621, in which the Court distinguished *Everson* and *Board of Education v. Allen*, 392 U.S. 236 (1968), on the ground that in those cases the “state aid was provided to the student and his parents—not to the church-related school”; *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 781; *Walz v. Tax Commission*, 397 U.S. at 675.

The reasons for this distinction follow directly from the rationale for the Establishment Clause itself. When government provides assistance to individuals for secular reasons, it is evident that the government is not using its resources to prefer one religion over another, or even religion over nonreligion—even though some individuals may make use of the benefit in a religious manner. The ultimate use and allocation of the benefit will not be determined by the government, but “only as a result of numerous, private choices of individual” citizens. *Mueller v. Allen*, 463 U.S. at 399.

In this respect, the provision of aid here is similar to the tax deductibility of contributions to religious organizations. Although tax deductions for contributions undoubtedly confer a substantial benefit on churches and synagogues—along with countless other charitable, educational, scientific, cultural, and historical organizations—their constitutionality has never been questioned by this Court, precisely because the deductions operate to increase the “diversity and pluralism in all areas” of our society (see *Lynch v. Donnelly*, slip op. 8) and facilitate both the free exercise of religion by believers and similar voluntary associational activities by their adherents. See generally *Walz v. Tax Commission*, 397 U.S. at 689 (Brennan, J., concurring).

The State could, if it chose, channel its vocational assistance for handicapped persons toward careers the State deems appropriate, or insist that rehabilitative programs be undertaken in educational institutions operated by the State. However, to leave these decisions to the individuals involved is an equally permissible approach—one which enhances individual choice, increases the diversity of skills

available to society, and widens the range of educational institutions in the community.

Moreover, when government aid is provided to individuals, as opposed to institutions, there is no danger of entangling administrative relationships between government and religious officials. Other than the relatively routine decision to accredit an educational institution on the basis of educational quality—an administrative relation long held to be constitutional (see *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925))—such an approach does not involve the government in the affairs of the institution. Cf. *Walz v. Tax Commission*, 397 U.S. at 675 (“Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.”). Accordingly, as this Court has recently observed, “a program * * * that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.” *Mueller v. Allen*, 463 U.S. at 398-399.

Federal government programs are structured in accordance with this constitutional framework. Generally speaking, when benefits are provided to individuals, the government does not require that the individual use the aid for nonreligious purposes or in nonreligious settings. The very context in which this case arises—higher education assistance—is a prime example. Grants directly to students, such as Pell Grants or GI Bill benefits, may be used by those students, if they choose, for education in religious colleges or for training for church-oriented careers. See pages 2-4, *supra*. The federal govern-

ment does not consider it appropriate, on Establishment Clause grounds or any other, to limit the freedom of students assisted under these programs to choose religious alternatives. The test for providing such benefits should not be whether the student's chosen course of study is in a school sponsored by a religious group, has religious content, or leads to a religiously-oriented career, but whether it leads to a valid "educational, professional, or vocational objective." See 38 U.S.C. 1670.¹⁰

On the other hand, when aid is provided directly to institutional grantees, limitations are often placed on the aid to ensure that it is used for secular purposes and not diverted to religious ends. See, *e.g.*, 20 U.S.C. 122 (grants to Howard University may not be used for the support of the theological department); 20 U.S.C. 1021(c) (college or research library grants may not be used for written materials used in sectarian instruction or religious worship); 20 U.S.C. 1070e, 1070e-1 (cost of instruction grants to colleges may not be used for school of divinity, religious worship, or sectarian activity); 29 U.S.C. 1517,

¹⁰ The only provision of which we know that might be considered an exception is 20 U.S.C. 1134e(g). The Secretary of Education is authorized to make grants to institutions of higher education so that those institutions may "mak[e] available the benefits of post-baccalaureate education to graduate and professional students who demonstrate financial need." 20 U.S.C. 1134d. Following provisions setting out priority categories for institutions and individual students (see 20 U.S.C. 1134e(d) and (e)), Section 1134e(g) provides that "[n]o fellowship shall be awarded under this part for study at a school or department of divinity."

1577(a) (Job Training Partnership Act funds may not be used for religious facilities).¹¹

The decision of the court below conflicts with this longstanding federal practice. Under the Washington Supreme Court's decision, the government would have to engage in far more searching inquiry into students' career objectives and courses of study than is now required—or even permitted—under law. A narrow interpretation of the decision would suggest

¹¹ Restrictions applicable to Rehabilitation Act grants, which presumably are the source of federal funding for the program at issue here, are of this sort. In general, Department of Education regulations preclude grants to institutional entities when such entities would use them for religious purposes, but place no such restrictions on facially neutral grants to individuals. Certain multi-program regulations now applicable to the Rehabilitation Act program prohibit the use of funds for "[r]eligious worship, instruction, or proselytization" (34 C.F.R. 76.532(a)(1)) or for "[a]n activity of a school or department of divinity" (34 C.F.R. 76.532(a)(4)). These regulations are based on the Department's interpretation of constitutional requirements. The Department has informed us that it interprets these restrictions as applying to grants to institutional grantees and subgrantees, but not as precluding *individuals* who may be the ultimate beneficiaries of financial assistance under this program from using it for vocational training in a school of divinity. The funds could not, for example, be granted to a university to make its divinity school accessible to the handicapped, but a scholarship grant under the program could be used by a handicapped individual to defray the cost of education at a divinity school.

The multi-program regulations quoted above became applicable to the Rehabilitation Act program only in 1981 (after petitioner applied for and was denied benefits), after responsibility for administration of the program was transferred to the Department of Education. At the time of petitioner's application, grants under this program had no specific restrictions regarding religious uses.

that the State is forbidden to fund only the "religious education" of persons intending to become ministers (Pet. App. A10); although, since petitioner's entire grant was disallowed, this narrow interpretation may not be correct.¹² Under the full force of the Washington Supreme Court's logic, any funding of religious studies is presumably suspect. Accordingly, the Veterans' Administration might well be required to insist that its state approving agencies (see page 3, *supra*) examine various unit courses taught at sectarian schools (such as Notre Dame University or Georgetown University) to determine whether they are religious or sectarian in nature, and the Department of Education might well have to require students to certify, as a condition of receiving a student loan, that they do not intend to enter the ministry. We submit that it is neither administratively feasible nor constitutionally appropriate for the government to engage in this type of inquiry. A neutral program of educational grants such as that now in place is, we submit, fully consonant with the Religion Clauses of the First Amendment.

Indeed, this Court has repeatedly distinguished "public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted"—specifically referring to the "G.I. Bill"—from impermissible forms of aid. *Nyquist*, 413 U.S. at 782-783 n.38; see also *Mueller v. Allen*, 463 U.S. at 398-399; *Wolman v. Walter*, 433 U.S. 229 (1977); *Wolman v. Essex*, 342 F. Supp. 399, 412 n.17 (S.D. Ohio), *aff'd*, 409 U.S. 808 (1972). And in *Americans United for the Separation of Church & State v.*

¹² Some of petitioner's course work—*e.g.*, speech instruction (see page 6, *supra*)—is apparently secular in nature.

Blanton, 433 F. Supp. 97 (M.D. Tenn.), *aff'd*, 434 U.S. 803 (1977), the Court summarily affirmed a lower court decision upholding a state statute providing aid to all needy college students, including but not limited to those in religious colleges.¹³ The judgment of the Washington Supreme Court is inconsistent with these decisions.

C. The Court Below Erred In Its "Primary Effects" Analysis By Focusing On The Religious Use In Isolation Rather Than On The Full Context Of The Program

The Washington Supreme Court employed the three-part Establishment Clause analysis of *Lemon v. Kurtzman*, 403 U.S. at 612-613. See Pet. App. A5-A6. The court had no difficulty in concluding that the State's program of vocational assistance to the blind has a legitimate secular purpose (*id.* at A6-A7). Cf. *Wallace v. Jaffree*, No. 83-812 (June 4, 1985),

¹³ In *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975), the court held that while the receipt by students of GI Bill benefits constituted federal financial assistance to the church-affiliated university involved in that case for purposes of the civil rights laws, it did not constitute unconstitutional state aid for purposes of the Establishment Clause. Cf. *Grove City College v. Bell*, No. 82-792 (Feb. 28, 1984), slip op. 8, 10 n.15, citing *Bob Jones University v. Johnson*, *supra*. The reasons advanced by the government and adopted by the Court in *Grove City College* for treating student grants as aid to the institutions for purposes of Title IX of the Education Amendments of 1972 derive from the statutory objectives and unambiguous legislative history. See slip op. 7-13. The constitutional standard for judging whether the "primary effect" of a program is to "advance religion," which serves far different purposes, is not the same as that adopted by Congress under Title IX for determining when an institution must comply with laws against discrimination.

slip op. 17. Moreover, commenting that the "‘entanglement’ inquiry is ill-suited to this case," the court stated that "the administrative and trial court records do not provide an adequate factual basis to make the type of [entanglement] inquiry contemplated by the Supreme Court" (*id.* at A12). The decision below thus rested entirely on a finding that "the principal or primary effect of the aid sought by [petitioner] would be to advance religion" (*id.* at A10).¹⁴

In analyzing the "primary effect" of the program, the court stated (Pet. App. A8):

Rather than look to the face of the rehabilitation statute, which is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought, we focus our attention on the particular aid sought by the [petitioner].

The court accordingly found (*id.* at A9-A10) that "[t]he provision of financial assistance by the state to enable someone to become a pastor, missionary, or church youth director clearly has the primary effect of advancing religion. * * * It is not the role of the state to pay for the religious education of future ministers."

¹⁴ If this Court reverses on the "primary effect" finding, and respondent chooses to litigate the issue of "‘entanglement’" on remand, it should be free to do so. As the court below recognized (Pet. App. A12), the factual record is insufficient to support a finding of unconstitutionality on this ground, and further fact-finding might be in order. On the merits we submit, however, that the program at issue plainly does not entail an excessive entanglement between church and state. The only direct relationship involving the government is that with petitioner Witters; the government is not involved in overseeing or regulating the religious institutions at which petitioner has studied.

This analytical approach is, we submit, fundamentally in error. If a court focuses solely on the challenged element in an overall program—i.e., solely on the religious element—it will always find that the "primary effect" is to advance (or inhibit) religion. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, slip op. 10. The "crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Tilton v. Richardson*, 403 U.S. at 679 (emphasis supplied). To determine whether the religious effect is "primary," one must necessarily examine that effect in the context of the program as a whole.¹⁵

Here, for example, there can be no claim that the state vocational rehabilitation program, taken as a whole, runs afoul of the "effects" test, properly conceived. It is probable that only a tiny fraction of the beneficiaries use their vocational rehabilitation grants to prepare for a religious vocation.¹⁶ Even the court below acknowledged (Pet. App. A8) that the program is "neutral in that benefits are provided to the stu-

¹⁵ The approach of the court below would be sound only if the Establishment Clause were held to prohibit any government action, the ultimate effect of which is to benefit religion—a view that has been consistently rejected by this Court. *McDaniel v. Paty*, 435 U.S. at 638 (Brennan, J., concurring); *Hunt v. McNair*, 413 U.S. 734, 742-743 (1973); *Everson v. Board of Education*, 330 U.S. at 16.

¹⁶ In this respect, the instant case is less troublesome than *Mueller*. In *Mueller*, the evidence suggested that the "bulk" of the benefits involved would flow to religious uses, partly because 96% of the children in private schools attended religiously-affiliated institutions. 463 U.S. at 401.

dent irrespective of the type of school attended or the degree sought." The effect of the rehabilitation program is precisely the same as its purpose: it provides vocational training to handicapped persons to improve their job skills and self-reliance. There is no reason to assume that the benefit to religion from providing aid to otherwise eligible students for the ministry, to the extent there is any benefit, is other than minor and incidental.

This Court has never used the analytical approach employed below to strike down the neutral provision of benefits to a wide spectrum of beneficiaries. Rather, the Court has used the opposite approach—to examine the challenged "effects" in the context of the wider program.¹⁷ See, e.g., *Mueller v. Allen*, 463 U.S. at 397-399 (tax deduction statute available to all parents of schoolchildren, including those with children attending sectarian private schools); *Widmar v. Vincent*, *supra* (access to university facilities by all student groups, including religious groups); *Tilton v. Richardson*, 403 U.S. at 687 (construction grants for higher education facilities generally); *Walz v. Tax Commission*, *supra* (tax exemptions for all educational and charitable non-profit institutions); *Board of Education v. Allen*, 392 U.S. at 242 (textbook loans to all schoolchildren); *Everson v. Board of Edu-*

¹⁷ The court below relied for its approach on a statement in *Hunt v. McNair*, 413 U.S. at 742, that under the "effects" inquiry a court must "narrow [its] focus from the statute as a whole to the only transaction presently before us." See Pet. App. A8. However, in *Hunt*, the Court upheld the program even on that narrow basis, making it unnecessary to consider alternative bases for a finding of constitutionality. The decision there provides no warrant for invalidating a program where, under the full context of the program, the "primary effect" is not to advance or inhibit religion.

cation, 330 U.S. at 16 (bus fare extended to all schoolchildren). In any of these instances, the Washington Supreme Court's analysis would have led to invalidation of the program.

The State's vocational rehabilitation program involved in this case has all the traditional indicia of a secular government assistance program with a secular primary effect. The program is neutrally designed to provide aid to *all* persons who fall within the class of beneficiaries—the visually handicapped. Contrary to the Washington Supreme Court's view, a program that assists a broad class of beneficiaries without regard to religion does not violate the Establishment Clause merely because one, some, or even many of the beneficiaries happen to be religious. "The historic purposes of the [Establishment Clause] simply do not encompass th[is] sort of attenuated financial benefit [to religion], ultimately controlled by the private choices of individual" beneficiaries. *Mueller v. Allen*, 463 U.S. at 400.

D. This Court Need Not, And Should Not, Consider The Remaining Issues In The Case

The sole basis for the decision below was the Establishment Clause of the First Amendment. This rationale had not been advanced by respondent before the Washington Supreme Court or at any other stage in the litigation. The theory most vigorously pressed by respondent was that the provision of aid to petitioner for his education for the ministry would violate the State's equivalents to the Establishment Clause, Wash. Rev. Code Ann. art. 1, § 11; art. 9, § 4 (1966). The court below found it "unnecessary to address the constitutionality of the aid under our state constitution" (Pet. App. A2). The court did,

however, strongly hint that it would find the aid unconstitutional under the state constitution, commenting that "our state constitution requires a far stricter separation of church and state than the federal constitution" (*ibid.*).

If the state constitution is held to prohibit aid to petitioner's education, that holding will raise serious and difficult questions of federal statutory and constitutional law, which have not been addressed by the lower courts. Specifically, it will raise the question whether petitioner is entitled to participate in the program under the terms of the federal grant to the State, and, if so, whether the State is permitted under the program to attach more stringent (and arguably discriminatory) eligibility criteria than those adopted by Congress and the Secretary of Education. See 29 U.S.C. 721(a)(5)(A). Moreover, assuming that there is no federal statutory bar to excluding petitioner from the program, such an interpretation of the state constitution would raise the question whether petitioner's rights under the Equal Protection Clause or the Free Exercise Clause would be infringed by a ruling that church-oriented careers alone are excluded from the benefits of the program. That question, not dissimilar to the issues raised in *Board of Trustees v. McCreary*, No. 84-277 (Mar. 27, 1985) (equally divided Court); *Widmar v. Vincent*, *supra*; *McDaniel v. Paty*, *supra*; and *Sherbert v. Verner*, 374 U.S. 398 (1963), is substantial, and the Supreme Court of the State of Washington should have an opportunity to consider the question in the first instance. Although that court has considered, and rejected, petitioner's free exercise argument (Pet. App. A14-A17), it did so on the assumption that the Establishment Clause would be violated by a grant of the vocational rehabilitation benefits. If there are no

countervailing federal constitutional considerations, the argument may appear in a different light. Moreover, the court expressly declined to address petitioner's "novel" equal protection claim because the Establishment Clause holding made resolution of that claim unnecessary (*id.* at A16-A17).

There is no need for this Court to grapple with these issues in the current posture of the case, unassisted by the views of the courts below. Although the Washington Supreme Court has adumbrated its likely answer to the question whether the state constitution would be violated by a grant for the support of petitioner's vocational education, the court expressly declined to decide the issue in a formal sense. This Court should not address the sensitive question of the compatibility of a state's constitution with the federal constitution in the absence of a definitive interpretation of the state constitution. Moreover, the state courts have not explained the basis and rationale for the state constitutional provision. It would therefore be difficult to evaluate whether the distinctions drawn by the State would pass muster under the Equal Protection Clause or be sufficiently compelling to outweigh petitioner's free exercise rights.

Accordingly, we urge the Court to confine its consideration to the Establishment Clause holding of the court below, and allow the parties to raise any other issues on remand, if the judgment is reversed.

CONCLUSION

The judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted.

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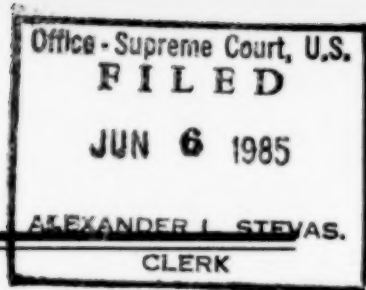
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JUNE 1985

(6)
No. 84-1070



IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

On Writ Of Certiorari To The Supreme Court
Of The State Of Washington.

**BRIEF OF THE NATIONAL
LEGAL CHRISTIAN FOUNDATION,
AMICUS CURIAE, IN SUPPORT
OF THE PETITIONER**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

—
 No. 84-1070
 —

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
 COMMISSION FOR THE BLIND

Respondent.

—
 On Writ Of Certiorari To The Supreme Court
 Of The State Of Washington.
 —

**BRIEF OF THE NATIONAL
 LEGAL CHRISTIAN FOUNDATION,
 AMICUS CURIAE, IN SUPPORT
 OF THE PETITIONER**

INTEREST OF AMICUS CURIAE¹

The National Legal Christian Foundation is deeply concerned about the pervasive religious discrimination implied in the state of Washington Supreme Court's decision in this case. The Foundation believes this decision misinterpreted both the U.S. Constitution and the Washington Constitution when it

¹ Counsel of record to both parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk of the U.S. Supreme Court pursuant to rule 36.

refused to fund a blind student's choice of education merely because he chose to attend a Bible school. The state governments and the Federal Government, ever since the beginning of this century, frequently have made public money available to students of various classifications with no restrictions except that such public money be used for higher education. A student receiving public money could study to be anything he wanted: a lawyer, doctor, pastor, engineer, philosopher, or anything else. The Washington statute authorizing assistance to the handicapped and its application in this particular case, does *not* advance religion. It merely provides equally to all handicapped students the necessary financial assistance to attain the vocation of their choice. The primary effect of the statute is to assist the visually handicapped to enable them to support themselves. For the Washington Commission of the Blind to prohibit a blind student from receiving public money merely because he chose to acquire an education which would enable him to become a pastor, missionary, or Christian educator, has unconstitutionally discriminated against this blind student, denying him equal participation in public benefits which all his fellow blind students enjoy. In addition, the blind student's right to freely exercise his religion by choosing a religious vocation instead of a secular one is clearly inhibited by the Washington Commission's denial. Finally, since the Washington Commission for the Blind's program to aid the visually handicapped is neutral in its primary effect, the Establishment Clause of the First Amendment does not prohibit the Commission from allowing a religious student to benefit. Although the Establishment Clause prohibits the establishment of religion, it also requires the accommodation of that religion.

The National Legal Christian Foundation is a non-profit religious organization established in order to preserve the religious liberties guaranteed by the U.S. Constitution, especially in the area of education. Through frequent national symposiums, seminars and a monthly newsletter, the National Legal Christian Foundation promotes awareness and addresses religious education issues on both state and national

levels which have a significant impact on religious freedom in the United States.

Amicus curiae is represented by a participating attorney with the National Legal Christian Foundation, Counsel John Eidsmoe. Counsel Eidsmoe specializes in constitutional litigation and teaches constitutional law at O. W. Coburn School of Law. He has assisted The Rutherford Institute, The Christian Legal Society and Concerned Women for America's Education and Legal Defense Foundation in First Amendment litigation on numerous occasions. Counsel Eidsmoe is also the author of several books and articles devoted to the interpretation and application of the First Amendment and other religious freedom clauses to contemporary legal issues. This brief is filed to provide assistance and views to the court relating to the Establishment Clause of the First Amendment and public financing of higher education.

STATEMENT OF FACTS

Amicus curiae adopt by reference the facts outlined in the petitioner's brief. It should be emphasized first of all, that Larry Witters has met and does meet the medical and physical eligibility requirements specified under chapter 74.16 of the Revised Code of Washington for status as a legally blind person qualifying him to receive educational assistance. Secondly, that program for the blind is publically funded by a combination of 80% Federal funds and 20% state of Washington funds. Thirdly, petitioner Witters at the time the public funds were denied was enrolled in the Inland Empire Bible School in Spokane, Washington. The Bible School is a private institution supported by private donations which provide a Christian education offering a three-year Bible diploma and a four-year Bachelor of Arts degree. Petitioner Witter is presently engaging in the four-year program in order to equip himself for a position as a pastor, missionary or youth director. Petitioner Witters, as a result, was denied vocational rehabilitation funds by the Washington State Commission for the Blind because of its policy statement which states:

"The Washington Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas."

Lastly, on appeal the Washington Supreme Court upheld the Commission's ruling.

SUMMARY OF ARGUMENT

Historically, the Federal government's position towards religion has been a position of *accommodation*. The Framers, when writing the U.S. Constitution, were concerned with accommodating religious freedom, expression, and education not its eradication from public life. This Court has relied upon the intent of the Framers of the Constitution for a proper interpretation of the Establishment Clause. The Framers who advocated public support for religion would not have used the First Amendment to prohibit public financial aid to a religious blind student who wanted to become a minister.

In ruling, the Washington Supreme Court erred by misapplying the tripartite test found in *Lemon v. Kurtzman* 403 U.S. 602 (1974). The primary effect of granting public aid to blind students does not advance religion if it happens to benefit a religious blind student. Allowing a religious student to participate in a neutral government program is not a violation of the Establishment Clause but rather a proper fulfillment of that blind student's right to public aid under the laws.

The Washington Supreme Court failed to analyze the overall context of the state practice to determine whether its primary effect is to advance religion. The Court *cannot* focus exclusively on the religious component of any activity because it would inevitably lead to its invalidation under the Establishment Clause. Such focus is improper. The Supreme Court of Washington should have analyzed the effect of the overall Washington program to provide vocational training to any and all blind students. Instead, the Washington Supreme Court analyzed solely its effect of helping a religious blind student attain his choice of vocation as a minister.

Lastly, by singling out Larry Witters and refusing to grant him public benefits even after he met all requirements necessary for handicapped recipient, the Washington Commission has violated Witter's free exercise of his religion in pursuing a religious vocation.

ARGUMENT

I The Original Intent Of The Framers To Accommodate Religion Does Not Prohibit Public Benefits To Be Distributed To Religious Individuals Under The Establishment Clause

When the Framers of the U.S. Constitution wrote "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" they intended to accommodate religion, but not to establish it. Justice Joseph Story, who serves on the U.S. Supreme Court for 34 years, summarized the purpose of the Establishment Clause,

... At the time of the adoption of the Constitution, and of the First Amendment to it ... the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship ... the real object of the Amendment was ... to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the National Government.

J. Story, 2 Commentaries on the Constitution of the United States 593-95 (2d ed., 1851). This Court confirmed this interpretation in 1971 when it stated that the purpose of the religion clauses in the First Amendment is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other". *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971). The main emphasis then, of the First Amendment is to create a degree of separation between the institution of the church and the institution of the state. No existence of separation, however, is required

between a religious individual and the institution of the state unless the state inhibits the individual's free exercise of that religion. Witters, a religious individual, is being denied state benefits because the state claims Witters' participation in the program would establish religion. The fact remains that the public aid is being denied to a religious individual solely because he is pursuing a religious vocation. Witters is not a religious institution from which the state must separate itself but only a religious individual.

Of course, "total separation is not possible in an absolute sense," *Lemon v. Kurtzman, supra*, even between the institutions of church and state. This Court recently emphasized that the Constitution does not require complete separation of church and state; "... it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility to any." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1984). Rejecting a claim that a released-time program at a public school violated the Establishment Clause, Justice Douglas, writing the opinion for this Court, emphasized, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. at 684 (1952). There has been, in fact, an unbroken history of official acknowledgement, by all three branches of governments, of the role of religion in American life from 1789 until today. *Lynch, supra*, 104 S.Ct., at 1360. In light of government accommodation of religion since the birth of the United States as a country, the act by the Washington Commission to deny a blind student public aid only because he seeks to pursue a religious vocation shows "callous indifference" toward religion which was never intended by the Establishment Clause. *Zorach, supra*, 343 U.S., at 314, 72 S.Ct., at 684. Such hostility toward religion would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of free exercise of religion." *McCullum v. Board of Education*, 333 U.S. 203, 211, 212, 68 S.Ct., 461, 465 (1948).

As the U.S. Supreme Court has emphasized in the past, "historical evidence sheds light not only on what the draftsmen

intended the Establishment Clause to mean but also how they thought that Clause applied . . . [and] their actions reveal their intent." *Marsh v. Chambers*, 103 S.Ct. 3330, 3344 (1983). For example, James Madison and Thomas Jefferson, both credited with contributing to the writing of the Establishment Clause, extensively sought to accommodate religion. In 1803, Jefferson proposed to the U.S. Senate a treaty with the Kaskaskia Indians in which the Federal Government would agree to "give annually for seven years one hundred dollars towards the support of a priest" and "further give the sum of three dollars to assist the said tribe in the erection of a church." *A Treaty Between the United States of America and the Kaskaskia Tribe of Indians*, 7 Stat. 78-79 (Peters ed. 1846). Jefferson, in addition, as President of the school board in the District of Columbia, had the Bible and Watts Hymnal used as primary texts in public schools. J. Wilson, *Public Schools of Washington*, 1 Records of Columbia Historical Society 4 (1887). Justice Reed also has pointed out that Jefferson advocated that religious instruction be taught at the University of Virginia even though the university was completely controlled by the Commonwealth of Virginia. *McCullum, supra*, 333 U.S. at 245-246.

Madison, similarly, voted for a bill authorizing payment of ministers for their services. *Marsh, supra*, 103 S.Ct. at 3333. Since the members of the First Congress, as a result, voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment, they could not have intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. *Lynch, supra*, 103 S.Ct. at 3335. In applying the First Amendment to the states through the fourteenth Amendment,

It would be incongruous to interpret that clause as imposing more stringent first Amendment limits on the states than the draftsmen imposed on the Federal Government.

Lynch, supra, 103 S.Ct. at 3335.

Providing public benefits for an eligible blind student who has chosen to become a minister seems to agree fully with the

Framer's intent regarding the Establishment Clause. The fact that House Chaplains are paid with public money (as affirmed by this Court in *Marsh, supra.*), clearly supports the payment of public money to a religious student to pursue ministry without causing any violation of the Establishment Clause. For the state of Washington to claim their standards regarding establishment of religion are more stringent than the Federal Constitution, thus preventing Witters from receiving aid, completely contradicts this Court's longstanding position of interpreting the Establishment Clause in light of the framer's intent. The intent of the Framers was to accommodate religion, not to effect total separation from and the eradication of religion.

II Granting Of Financial Aid By The Washington Commission For The Blind to A Handicapped Student Who Is Pursuing A Religious Vocation Does Not Have the Primary Effect Of Advancing Religion.

In order to withstand a challenge under the Establishment Clause, the granting of educational assistance requested by Witters, must satisfy all three parts of the *Lemon* test, which requires:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 21111, 29 L.Ed.2d 745 (1971). The first and third part of the tripartite test have been satisfied and are not in dispute in this case. According to the Washington Supreme Court, Witters failed the second part of the test. The court held,

The provision of financial assistance by the state to enable someone to become a pastor, missionary, or church youth director, clearly has the primary effect of advancing religion.

Witters v. Commission for the Blind, 689 P.2d 53, 56 (Wash. 1984)

In other words, the Washington Supreme Court is concluding that the state must single out handicapped college students who wish to pursue religious careers and deny them vocational rehabilitation assistance that is otherwise available to all handicapped college students in Washington. Although individual Establishment Clause challenges have been raised against individual religious institutions, this is the first time that the Clause has been used to challenge the right of a single individual to participate in a neutral program.

In every case prior to this, the Court has focused on the primary effect of the entire program in question, not on how each individual recipient uses the public funds. The primary effect of the Washington Commission for the Blind is neutral: The program merely grants vocational rehabilitation aid to all handicapped students equally. The fact that a few recipients might choose to spend their money on vocational training in order to pursue a religious career does not give the program a "principal or primary effect" of advancing religion. The program as a whole successfully accomplishes the secular effect of enabling handicapped students to be trained in a vocation to support themselves. This secular effect of the program fulfills the Washington Commission's purpose for the program which the Washington Supreme Court found to be a clearly secular purpose. *Witters*, 689 P.2d at 56.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court reasoned that the overall content of the state practice (or program) is directly relevant in determining its primary effect. In this case, the state of Missouri challenged the use of facilities at the University of Missouri at Kansas City for religious worship and speech as violating the Establishment Clause. This Court held that absent evidence of domination of university facilities by religious groups, advancement of religion would not be the primary effect of allowing the school facilities for use by all

groups. This Court further emphasized that "the provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 at 274. The fact therefore, that one recipient of public aid uses such aid for training in a religious career does not defeat the overall secular effect of the Washington Commission's provision of benefits "to so broad a spectrum of groups."

In support of the above, this Court held in 1983,

As *Widmar* and our other decisions indicate, a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

Mueller v. Allen, 463 U.S. 388, 398-399 (1983). In this case, the Court concluded that it was not a violation of the Establishment Clause to permit parents of private school students to be given a tax deduction for tuition payments even though this program was used primarily by religiously educated students. The *Mueller* decision resulted in religious students being treated in an equal manner as secular school students. If Witters was allowed to receive aid for the handicapped, he as a religious student would be treated exactly like all non-religious blind students seeking training in a vocation.

The sole factor that some religious students benefit from public aid does not conclude the state benefit program is in violation of the Establishment Clause. There is no doubt that supplying Witters with financial aid in order to become a minister has the effect of advancing religion in some sense. This Court, however, has made it completely clear that

Not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid.

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 at 771, 93 S.Ct., at 2965 (1973); see also *Widmar*, *supra*, 454 U.S. at 273. The fact that Witters is planning to use his financial aid to pursue a religious career has an incidental effect of advancing religion. The program as a

whole, however, still fulfills its secular purpose by providing support to all blind students to be trained in a vocation to achieve self-support. When Witters attains self-support by being trained in a religious career, the effect of the Washington benefits will be secular.

This reasoning above was confirmed in several older decisions that this Court summarized in *Roemer v. Board of Pub. Works*, 426 U.S. 736, 96 S.Ct. 2337 (1976). This Court upheld grants given by the State of Maryland to several religious and nonreligious colleges alike. Since the grants were not given to only religious schools, the overall effect of the state grants remained secular. This Court emphasized that

Religious institutions need not be quarantined from public benefits that are neutrally available to all. The Court has permitted the state to supply transportation for children to and from church-related as well as public schools. *Everson v. Board of Education*, 330 U.S. 1 (1947). It has done the same with respect to secular textbooks loaned by the state on equal terms to students attending both public and church-related elementary schools. *Board of Education v. Allen*, 392 U.S. 236 (1968) . . . the state was merely "extending the benefits of state laws to all citizens." *Id.*, at 242. Just as *Bradfield [v. Roberts]*, 175 U.S. 291 dispels any notion that a religious person can never be in the state's pay for a secular purpose, *Everson* and *Allen* put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity.

-426 U.S. at 746-7

The fact that in *Allen*, *supra*, *Everson*, *supra*, and *Tilton v. Richardson*, 403 U.S. 672 (1971), the beneficiaries included *all* school children and *all* institutions of higher learning, no primary effect of advancement of religion was found by this Court (see *Nyquist*, *supra*, 413 U.S. at 782 n.38). Therefore, since the Washington Commission for the Blind's program is available to *all* blind students, no primary effect of advancing religion should be found even if some blind student beneficiaries happen to be pursuing a religious vocation.

The Washington Commission for the Blind's Program is neutral and valid since it is directed to a broad class of students not predominantly composed of students attending religious schools. The fact that some religious students do receive public support is merely incidental to the secular effect and purpose of the program much like state provided police and fire protection which is available to all citizens regardless of their religious affiliation [see *Wolman v. Essex*, 409 U.S. 808 (1972).]

The dissent in *Witters* concluded accurately.

It is highly likely that only a very small percentage of the handicapped students benefitted by the program would choose to pursue religious career training, and that those that do will provide the institution they attend only indirect and incidental benefits from state funds resulting entirely from the individual students own personal, uncoerced choice of college, a situation that grants no "imprimatur of state approval" for any particular religious college or career.

689 P.2d at 62.

CONCLUSION

The Washington State Commission for the Blind's denial of financial aid and the Washington Supreme Court's ruling constitute a misapplication of the Establishment Clause. Historically, the Federal Government's position towards religion has been a position of accommodation. The Framers of the Constitution who advocated public support for religion would not have used the first Amendment to prohibit public financial aid to a religious blind student who wanted to become a minister. In fact, they authorized payment of public money to the appointed House chaplains.

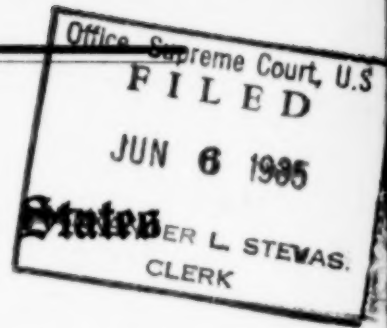
The primary effect of the Washington Commission for the Blind's financial program is neutral, providing vocational rehabilitation aid to all handicapped students equally. The program as a whole successfully accomplishes the secular effect of enabling handicapped students to be trained in a vocation to support themselves. This overall context of the

state practice is directly relevant in determining its primary effect. The fact that one recipient of public aid uses such aid for training in a religious career does not defeat this overall secular effect of the Washington Commission's provision of benefits "to so broad a spectrum of groups."

It is urged that this Court decide this case in favor of the blind student's right to a public benefit and thereby prevent future discrimination and exclusion of students in need of financial assistance merely because of their religious beliefs.

Respectfully submitted,

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IN THE
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COMMISSION FOR THE BLIND,

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of the State of Washington

**BRIEF OF THE AMERICAN JEWISH COMMITTEE
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether the Establishment Clause prohibits a governmentally-funded vocational rehabilitation program from providing financial vocational assistance to an otherwise-eligible blind student who intends to use the assistance in studying for a career as a Christian pastor, missionary, or youth director.

STATEMENT OF INTEREST

The American Jewish Committee (AJC), as *amicus curiae*, respectfully submits this brief supporting reversal of the decision below.

The American Jewish Committee, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty. Nevertheless, AJC believes that the Establishment Clause should not be interpreted so as to exclude religiously-oriented persons from the benefits of state-supported assistance programs solely because the provision of such assistance may provide financial benefit to a religious institution of higher education. In the long run, such a view of the scope of the Establishment Clause would do nothing to strengthen the separation between church and state. Rather, it would serve only to deprive otherwise qualified individuals from governmental benefits to which they would be entitled, thereby substantially undercutting the legitimate secular aims of the government assistance programs themselves.

III

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No. 84-1070

IN THE
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OCTOBER TERM, 1984

LARRY WITTERS,
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v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF OF THE AMERICAN JEWISH COMMITTEE
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

This brief is submitted with the consent of the parties.

Originals of the letters reflecting such consent are
being filed with the Clerk of the Court simulta-
neously with the filing of this brief.

STATEMENT OF THE CASE

The State of Washington, through Respondent Commission, subsidizes (in conjunction with the federal government) vocational training for the blind by paying tuition and living expenses while participants receive "training in the professions, business or trades." Petitioner Larry Witters applied for such aid in connection with his attendance at a Christian religious college with the vocational goal of becoming a Christian "pastor, missionary or youth director." The Commission denied his application on the ground that to provide such assistance would constitute support for religious studies in violation of the Washington State Constitution.

In the judgment under review here, the Washington Supreme Court, without reaching the question of state law, affirmed the Commission's action on the ground that state support for Petitioner's "career goal of becoming a minister" was prohibited by the Establishment Clause of the First Amendment to the United States Constitution, particularly because its primary effect was to advance religion in violation of the second prong of the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The decision of the Washington Supreme Court is reported at 102 Wn.2d 624, 689 P.2d 53 (1984). The prior judicial and administrative proceedings are not reported.

SUMMARY OF ARGUMENT

The *amicus* here has a long history of supporting strict separation of church and state. But, in our view, the State of Washington's grant to Petitioner of the same aid for vocational training as it grants to all blind applicants would not violate the Establishment Clause merely because Petitioner has chosen vocational training to become a Christian minister.

The Washington Supreme Court has misconstrued the limitations upon state action set by the Establishment Clause. This Court has consistently held that state programs open to a broad class of non-religious as well as religious beneficiaries do not have a primary effect of advancing religion solely because individual participants choose to utilize those programs in furtherance of their religious beliefs. *Mueller v. Allen*, ___ U.S. ___, 103 S.Ct. 3062, 3068-69 (1983); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *Everson v. Board of Education*, 330 U.S. 1, 18 (1947). The contrary result arrived at here by the Washington Supreme Court penalizes that small group of handicapped students who elect to pursue religious studies, in a fashion that is not mandated by the strong state interest in maintaining the separation of church and state.

The constitutional analysis of the Washington Supreme Court errs in three major respects. First, it relies entirely on cases dealing with direct aid to sectarian schools, while virtually ignoring this Court's decisions regarding aid to individuals. This Court has upheld aid to individuals in every recent case except one, *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). The cases on aid to individuals, including *Nyquist*, set a clear line of demarcation: whereas "ingenious plans for channelling state aid to sectarian schools" through individuals are unconstitutional, *id.*, 413 U.S. at 785, religious use by some individuals of aid made available to a "broad spectrum of citizens" (such as the blind) does not offend the Establishment Clause. *Mueller v. Allen*, *supra*, 103 S.Ct. at 3069.

The Washington Supreme Court erred also in its improper focus on Petitioner's individual vocational choice (rather than on the state program of aid to the blind as a whole) in determining whether the questioned state action has a primary effect of advancing religion. The controlling precedent of this Court holds that occasional religious use of a broadly available state program is an "incidental" and not

a "primary" religious effect, and thus is no violation of the Establishment Clause. *Widmar v. Vincent*, *supra*, 454 U.S. at 274.

Finally, the Washington Supreme Court failed to weight properly the fact that aid sought by Petitioner would be used to attend an institution of higher education rather than a primary or secondary school. The considerations that have led this Court to find a violation of the Establishment Clause have often turned on the distinction between these types of religious institutions. *See Widmar v. Vincent*, *supra*, 454 U.S. at 274 n.14; *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971).

Petitioner also asks this Court to hold that the state's denial of grants for vocational training for the ministry — while providing them for any secular trade or profession — violates the Free Exercise Clause. It is unnecessary, however, for this Court to reach the Free Exercise issue. The Commission's sole ground for denying Petitioner's application was its view that such a grant is prohibited by the state constitution. Petitioner properly raised the state-law issue below, but the Washington Supreme Court, diverted by its erroneous analysis of the United States Constitution, failed to decide it. This Court should vacate the judgment below on the federal question and remand for a determination of Petitioner's eligibility under state law.

ARGUMENT

The Establishment Clause Does Not Preclude The State From Offering Financial Vocational Assistance To All Handicapped Students Including Those Who Use Such Funds To Study For A Religious Vocation.

Under the stipulated facts, the State of Washington sought to further its neutral, secular, and wholly laudatory purpose of providing vocational assistance to blind students by helping to subsidize, with state and federal funds, academic training for vocations of virtually all kinds. Petitioner Witters, although meeting the medical and physical eligibility requirements for receipt of such assistance, was denied the assistance solely because he intended to pursue academic training at a sectarian institution in preparation for a career as a Christian pastor, missionary, or youth director. Although such denial was initially premised on an interpretation of the Washington State Constitution, the Supreme Court of the State of Washington (the "Washington Court"), in affirming the denial, grounded its decision on the Establishment Clause of the First Amendment. The Washington Court's analysis of the Establishment Clause is contrary to this Court's pertinent precedents.

The Washington Court properly pursued its analysis under the familiar three-part test of *Lemon v. Kurtzman*, *supra*, 403 U.S. at 612-13: that the statute have a secular legislative purpose, that its principal or primary effect be one that neither advances nor inhibits religion, and that it not foster "an excessive government entanglement with religion." As the Washington Court conceded, a finding that the first test had been met in this case was "quite easy," since the obvious purpose of the state aid program, as stated in the statute itself, was "to assist visually handicapped persons to overcome vocational handicaps and to obtain the

maximum degree of self-support and self-care." 102 Wn.2d 624, 628, 689 P.2d 53, 56 (1984) (citing Revised Code of Washington 74.16.181).

But the Washington Court found that the second test of *Lemon* — that the primary effect must be one that neither advances nor inhibits religion — was not met in this case. The Washington Court admitted that the statute itself and the assistance program as a whole did not primarily advance religion; but it held that the primary effect of the assistance given to Petitioner — "the only transaction presently before us" (quoting *Hunt v. McNair*, 413 U.S. 734 (1973)) — was to advance religion, since the assistance was to be used "to pay for the religious education of future ministers." 102 Wn.2d at 628-29, 689 P.2d at 56. The Washington Court's conclusion was erroneous for several reasons.

First, the Washington Court disregarded this Court's well-settled distinction between government programs of assistance to religious institutions and government programs of assistance to individuals. If the primary effect of a government assistance program is to channel state aid to religious institutions, then it offends the Establishment Clause, even if the aid is channelled indirectly, via individuals. *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 785. But if the primary effect of a government assistance program is to channel aid to individuals for some secular purpose, there is no violation of the Establishment Clause, even if some religious institution is a beneficiary of such aid. *Mueller v. Allen*, *supra*.

Ignoring this distinction, the Washington Court relied on two inapposite cases: *Hunt v. McNair*, *supra*, and *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). Both cases involved government aid directed to religion-sponsored institutions of higher learning, rather than to individuals. And even then, the Court upheld the constitutionality of the direct aid given in both *Hunt* and

Roemer, on the ground that the religion-sponsored colleges in question were not "pervasively sectarian." Far more directly on point are this Court's decisions regarding aid to individuals, in nearly every one of which the Court has upheld such aid. Most recently, for example, in *Mueller v. Allen*, *supra*, the Court upheld a Minnesota statute allowing state taxpayers to deduct expenses incurred in providing tuition, text books and transportation for their children attending an elementary or secondary school. In so holding, the Court emphasized, first, that the deduction was available to all taxpayers, not just those sending their children to parochial schools (as in *Nyquist*, *supra*),¹ and, second, that the aid in question was directed primarily to the taxpayers and only incidentally to the institutions, including religious institutions, that sponsored the schools. As the Court stated: "the historic purposes of the [Establishment] clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Mueller*, *supra*, 103 S.Ct. at 3069. This conclusion applies, *a fortiori*, to the present case, where, even more than in *Mueller*, a neutral benefit is provided (payment of educational expenses for the visually handicapped) which only incidentally results in benefit to a religious institution.

The Washington Court erred also in its focus on Petitioner's individual vocational choice (rather than on the state program of aid to the blind as a whole) in determining whether the questioned state action has a primary effect of advancing religion. This narrow focus, which the

¹ In *Nyquist*, this Court specifically noted that its invalidation of state tuition grants there did not mean that the Court would necessarily also hold unconstitutional aid to religious institutions in "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted." 413 U.S. at 782 n.38.

Washington Court wrongly believed was mandated by *Hunt* (a decision which, as noted, did not involve aid to individuals at all), would, if carried to its logical conclusion, effectively preclude religiously-oriented individuals from receipt of most state benefits. In actuality, however, this Court has rejected such a narrow focus, most recently in *Widmar v. Vincent*, *supra*. *Widmar* involved the question of whether state university facilities generally available to all student groups could be used by student religious groups holding religious services. Upholding such use against the contention that it offended the second test of *Lemon*, the Court rejected the suggestion that the focus should be solely on the particular use made of the state facilities by the religious groups in question, without recognition of the fact that the facilities were available on equal terms to a broad class of non-religious as well as religious groups and activities. As the Court stated: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect [citations omitted]. If the Establishment Clause barred the extension of general benefits to religious groups, 'a Church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Widmar*, *supra*, 454 U.S. at 274-75 (quoting *Roemer*, *supra*, 426 U.S. at 747).

Finally, the Washington Court erred in its analysis under the second prong of the *Lemon* test by insufficiently weighting the fact that Petitioner will utilize the sought-after assistance in connection with attendance at an institution of higher education, rather than a primary or secondary school. As this Court has previously made clear, the concern that government not appear to sponsor religious activity is — while still an important consideration — less implicated in situations involving schools of higher education, given the greater maturity and lesser impressionability of the students and the voluntary nature of their attendance. See *Widmar v. Vincent*, *supra*, 454 U.S. at 274 n.14; *Tilton v. Richardson*, *supra*, 403 U.S. at 685-86.

In sum, the Washington Court erred in holding that the aid given to Petitioner here violated the second test of *Lemon* in that its primary effect was to advance religion. As for the third test of *Lemon* — that the aid not foster an excessive government entanglement with religion — the Washington Supreme Court declined to determine whether or not the test had been met, holding that such an inquiry was "ill-suited to this case." 629 Wn.2d at 630, 689 P.2d at 57. In so concluding, the Washington Court implicitly — and properly — found that there is nothing about the State of Washington's program for vocational assistance to the blind that remotely hints at such an entanglement.² Accordingly, the decision of the Washington Supreme Court that the providing of assistance to the Petitioner in this case violates the Establishment Clause must be reversed.

Having so reversed, however, this Court need not, and should not, go on to decide the additional question under the Free Exercise Clause raised by Petitioner. Rather, this Court should remand to the Washington Court for determination of the state law issues raised in this case. The Free Exercise issue raised by Petitioner — *i.e.*, whether the state can consistent with the Free Exercise Clause deny grants for vocational training for the ministry when such grants are available to a given group for virtually all other vocations and trades — is not merely a difficult issue but one not properly before this Court. The Commission's sole ground for denying Petitioner's application was its view that such a grant is prohibited by the Washington State Constitution. Petitioner properly raised the state-law issue below, but the Washington Court, diverted by its erroneous analysis under the United States Constitution, failed to decide it. A decision that the assistance sought by Petitioner Witters is not barred

² The absence of such potential entanglement between state and religion (among other factors) distinguishes this case from *Bender v. Williamsport Area High School*, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-773).

by the Washington State Constitution would obviate the need to address the thorny Free Exercise issue. This Court has previously recognized the desirability, where feasible, of resolving cases upon narrow state law issues rather than upon broad and potentially difficult constitutional grounds. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947) (dismissal of appeal in favor of clarification by state court of issues of state law). There will be time enough to deal with those latter issues if and when a ruling by the Washington Supreme Court on the meaning of that state's own "Establishment Clause" makes such course necessary.

Accordingly, this Court, after correcting the Washington Court's erroneous conclusion regarding the Establishment Clause, should remand for a determination of Petitioner's eligibility under state law.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed and the case remanded.

Dated: June 6, 1985

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CLERK

IN THE
Supreme Court of the United States

October Term, 1984

LARRY WITTERS,*Petitioner,*

v.

**THE STATE OF WASHINGTON COMMISSION
FOR THE BLIND,**

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WASHINGTON**

**BRIEF OF THE RUTHERFORD INSTITUTE,
THE RUTHERFORD INSTITUTE OF ALABAMA,
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THE RUTHERFORD INSTITUTE OF MINNESOTA,
THE RUTHERFORD INSTITUTE OF MONTANA,
THE RUTHERFORD INSTITUTE OF TENNESSEE,
THE RUTHERFORD INSTITUTE OF TEXAS, AND
THE RUTHERFORD INSTITUTE OF VIRGINIA,
AMICI CURIAE, IN SUPPORT OF THE PETITIONER**

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IN THE Supreme Court of the United States

October Term, 1984

No. 84-1070

LARRY WITTERS,

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v.

THE STATE OF WASHINGTON COMMISSION
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Respondent.

ON WRIT OF CERTIORARI TO THE
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BRIEF OF THE RUTHERFORD INSTITUTE,
THE RUTHERFORD INSTITUTE OF ALABAMA,
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THE RUTHERFORD INSTITUTE OF TENNESSEE,
THE RUTHERFORD INSTITUTE OF TEXAS, AND
THE RUTHERFORD INSTITUTE OF VIRGINIA,
AMICI CURIAE, IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE*

This case presents important issues concerning invidious discrimination against handicapped persons receiv-

*Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

ing public benefits. The Petitioner in this case has been denied benefits solely on account of his religious beliefs and commitments. The Rutherford Institute is greatly concerned about the implications for religious freedom and tolerance raised by the Supreme Court of Washington's decision in this case.

The Rutherford Institute believes that the Supreme Court of Washington erred when it ruled that the provision of state aid to a blind person studying for the religious ministry violated the Establishment Clause of the First Amendment. The benefits in question are provided for the secular purpose of training the blind to be self-reliant and productive citizens. It does not follow that the use of such benefits to obtain a religious education "establishes" religion. To the contrary, a state policy which excludes a person from generally available benefits, solely on religious grounds, constitutes invidious discrimination and places an impermissible burden upon that person's free exercise of religion.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amici Curiae* have specialized in constitutional litigation in state and federal courts, including the Religion Clauses of the First Amendment, and have participated as counsel for *amici curiae* in previous cases before this Court. Counsel John W. Whitehead has argued and served as special constitutional consultant in numerous First Amendment cases and has authored several books and law review articles that focus on in-

terpretation and application of the First Amendment Religion Clauses. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

In today's welfare state, it is inevitable that tangible and intangible benefits arising from federal and state governmental programs will inure to religious persons and groups. Whether or not benefit programs violate constitutional norms ultimately depends upon the relative posture of religion in the context of the state's program on the entire class benefitted. Except for the Court's "school aid" cases, e.g., *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), *Meek v. Pittinger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), where the Court has adopted a "secular-use" requirement for such benefits to be constitutional, this Court has approved without qualification public assistance made available to a broad spectrum of persons or groups on a neutral basis. *Mueller v. Allen*, 77 L.Ed.2d 721 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); *Everson v. Board of Education*, 330 U.S. 1 (1947). In this case, but for the Respondent's action, vocational assistance would be provided to *all* blind people on a neutral basis and, as such, would not benefit religion any more than police and fire protection, tuition tax credits, social security or any other form of public assistance made available to a broad class of persons constituting the general public. Were such assistance denied because of its potential incidental benefit to religious persons or groups, the Establishment Clause would be transformed into an instrument to repress religion and religious persons and groups from all aspects of public life. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

The denial of benefits to Petitioner also constitutes an impermissible burden upon the free exercise of Petitioner's religious beliefs. The state cannot condition the availability of public benefits upon conduct mandated by Petitioner's religious beliefs, thereby causing him to modify his behavior or violate his beliefs. *Thomas v. Review Board*, 450 U.S. 707 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Sherbert v. Verner*, 374 U.S. 398 (1963). Therefore, Respondent's denial of benefits violates the Free Exercise Clause.

The denial of benefits also constitutes invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. The state has placed Petitioner in a different class from other eligible aid recipients, solely on religious grounds, and discriminated by denying public benefits on that basis. The distinctions drawn are, thus, subject to strict scrutiny and must be justified by a compelling state interest. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Zobel v. Williams*, 457 U.S. 55 (1982). Analyzing this case under the tri-partite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1977), the putative Establishment Clause obligations advanced by the state do not constitute a compelling state interest, *Cf. Widmar v. Vincent*, 454 U.S. 362 (1981).

ARGUMENT

I.

The Establishment Clause Does Not Prohibit The Participation Of Religious Persons In Pure Public Benefits Accruing To A Broad Class Of Beneficiaries And Does Not Require That Such Benefits Be Used Only For Secular Purposes.

A. TRUE PUBLIC BENEFIT PROGRAMS HAVE NEVER BEEN THOUGHT UNCONSTITUTIONAL EVEN THOUGH RELIGIOUS PERSONS AND INSTITUTIONS THEREBY OBTAIN SUBSTANTIAL BENEFITS.

This Court has long recognized the right of religious persons and institutions to participate on an equal basis with others in benefits flowing from general welfare legislation. *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 17-18 (1947) (Church schools entitled to benefits of general government services such as ordinary police and fire protection, connections for sewage disposal, and public highways and sidewalks). The most purely public forms of such benefits in which religious institutions participate have never been thought to pose any constitutional problem, even though they represent a benefit in some sense to religion. *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 746-47 (1976) (Court never has held that church cannot receive general benefits such as police and fire protection).

In today's welfare state, it is inevitable that both tangible and intangible benefits arising out of federal and state government programs will inure to religious persons and groups. *Id.* at 745. Such aid is justified, not because there is no benefit conferred upon religion, but because religious groups or individuals participate on a *neutral* basis with other members of the benefitted class. In such a case, religious members of the class do

not actually benefit *relative* to other members.¹ The critical constitutional inquiry is, thus, not the degree or substantiality of the benefit to religion in an absolute sense,² but the relative posture of religion in the context of the impact of the state's program on the entire class.

B. THIS COURT'S DECISIONS INVALIDATING CERTAIN FORMS OF AID TO RELIGIOUS SCHOOLS DID NOT INVOLVE TRUE PUBLIC BENEFIT PROGRAMS.

The principle that religious persons may share in public benefits, although absolute as applied to true public benefit programs, applies less perfectly in cases dealing with governmental aid to private religious schools. This Court has held in those cases that the state may assist a private religious school with its secular function, but may not provide aid which is not specifically limited to such secular function or use. *See generally, Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittinger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977). Most of the school-aid cases involve attempts to distinguish the reach and effect of different

¹For this reason the neutral participation of religious persons in public benefits is not simply a *de minimis* advancement of religion, nor even necessarily a benevolent accommodation of religion. Rather it is merely the most neutral course for government to take, and therefore the course which most fully realizes the values embodied in the Establishment Clause. *Cf. Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 747 (1976) (neutral government action may encompass incidental benefit to religion).

²The degree of benefit does not determine constitutionality, for even programs that substantially benefit religion have been upheld by this Court. *See Mueller v. Allen*, 77 L.Ed 2d 721, 729 n. 5 (1983) (religions may benefit substantially from government action but this does not require the conclusion that the Establishment Clause is violated).

programs purporting to fit within the limitation it imposes.³

This Court's application of the "secular-use" test in the school-aid cases reflects the fact that those cases did not involve true public benefit programs. Instead, those cases involved aid to a class of beneficiaries composed predominantly of private religious schools. The various kinds of secular-use restrictions attached to such aid by the state legislatures evince their conscious orientation to religious schools as a primary target of the aid.⁴ No secular-use restriction would be necessary unless it were anticipated that the class of beneficiaries would include religious institutions. Moreover, such a restriction would presumably not even be expedient unless a significant percentage of the beneficiaries were religious schools. Hence, the inclusion of such a limitation in an aid provision presupposes that the program may not be a true

³Thus, this Court determined, *inter alia*, in *Lemon v. Kurtzman*, 403 U.S. 602, 619-20 (1971), that a salary supplement for teachers at a private religious school, although designed to support only the teaching of secular subjects, was unconstitutional because of the continuing state surveillance required to insure that the subsidized teachers did not engage in religious teaching. Applying a similar test, this Court approved federal grants for the construction of buildings at church-related colleges on the theory that the permanent restriction of such buildings to secular use brought this aid safely within the secular use limitation. *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971). In *Committee for Public Education v. Nyquist*, 413 U.S. 756, 783 (1973), this Court struck down, *inter alia*, a provision authorizing direct money grants to private religious schools, again because there was not sufficient assurance that the aid would be put to secular use.

⁴The salary supplements in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for example, were deliberately designed to benefit private schools. The District Court found that 95% of the pupils attending private schools were attending parochial schools. *Id.* at 608.

public benefit program and, *ipso facto*, gives rise to greater scrutiny of the use of the benefits granted.

The justification for this Court's approval of a school-aid program thus does not lie in the fact that religious schools were incidental members of a class of beneficiaries of a neutral public program. Rather, it is that religious schools were the predominant class of beneficiaries and therefore subject to the secular use restriction. By a parity of reasoning, those cases disapproving aid to religious schools do not represent an exception to, or an erosion of, the public benefit principle. All of these cases are, rather, better explained in terms of the secular-use restriction.⁵ That restriction should be recognized as a

⁵The dichotomy between secular and religious use, as employed to test the constitutionality of aid to religious schools, may be understood as an imperfect analogue of the public benefit concept. In this view, secular use of government aid by a religious school corresponds to benefits accruing to secular members of the class, and religious use of such aid corresponds to benefits accruing to religious members of the class. Thus, a program limiting aid to secular use is not unconstitutional merely because it also has the direct and "incidental" effect of benefitting the school's religious mission. *Cf. Committee for Public Education v. Nyquist*, 413 U.S. 756, 775 (1973) (indirect and incidental effect does not render legislation unconstitutional).

The logic supporting the secular-use test naturally bears some resemblance to the justification proffered for public benefit programs, because both derive from the fundamental principle of neutrality. Thus, many of the decisions dealing with aid to religious schools discuss the public benefit principle. *E.g., Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 746-47 (1976). However, the analogy between the two is imperfect and breaks down at several points due to the peculiar technical problems that inhere in attempting to carve out secular functions from the religious mission of a religious school. Thus, for example, a school-aid program may be unconstitutional if continuing surveillance is required to preserve the secular-use limitation, even though there is in fact no religious use. *Meek v. Pittinger*, 421 U.S. 349 (1975). The requirement of continuing surveillance arises out of the particular context of aid to a religious school and is unrelated to the public benefit concept.

discrete exception—wholly separate from the public benefit principle—to the general rule that government may not constitutionally provide direct aid to a religious institution.

C. THE WASHINGTON SUPREME COURT ERRONEOUSLY APPLIED THE SECULAR-USE TEST TO ASSISTANCE PROVIDED TO PETITIONER UNDER THE STATE OF WASHINGTON'S NEUTRAL PUBLIC BENEFIT PROGRAM.

The case before this Court, in contrast to the school-aid line of cases, involves a true public benefit program. Under the program established by the State of Washington, financial assistance is made available on a *neutral* basis to all visually handicapped persons pursuing an education in the "professions, business or trades." *Wit-ters v. State Commission for the Blind*, 689 P. 2d 53, 55 (Wash. 1984). Even the Washington Supreme Court recognized that the program "is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought" Notwithstanding the breadth of the class of beneficiaries in the present case, however, the Washington Supreme Court errone-

(footnote 5 continued)

Moreover, certain formalistic differences between the secular-use test and the public benefit principle make it difficult to extend doctrinal distinctions made with respect to the secular-use limitation to the public benefit context. For example, although the secular-use test permits an indirect and incidental benefit to religion, it does not permit any direct application of funds to religious purposes. The distinction between direct and indirect benefits is central to the operation of the secular-use test, and, on the level of analogy, may be understood as implementing the notion that religious members are only benefitting incidentally. But this does not mean, as the Washington Supreme Court seemed to think, that the public benefit concept must be applied to prevent any actual use of funds for religious purposes. This mistake has to do with confusing the analogy between the two doctrines and the formal operation of the tests themselves. It is an attempt to speak on a formal level in a language that has meaning only on an analogical level.

ously concluded that vocational assistance to Petitioner had the primary effect of advancing religion because it enabled him to "become a pastor, missionary, or youth director" *Id.* at 56. In doing so, it improperly applied a variant of the secular-use test, which it took from school-aid cases,⁶ to require that no religious use be made of state funds.

1. THE BREADTH OF THE CLASS OF BENEFICIARIES OF WASHINGTON'S VOCATIONAL ASSISTANCE PROGRAM—ALL VISUALLY HANDICAPPED STUDENTS PURSUING EDUCATION IN THE PROFESSIONS, BUSINESS OR TRADES—DEMONSTRATES THAT THE PROGRAM IS A TRUE PUBLIC BENEFIT PROGRAM UNDER THIS COURT'S RECENT DECISIONS.

This Court's recent decisions suggest that the breadth of the class benefitted by a government program has an important, if not determinative, bearing on whether the program should be treated as falling within the public benefit principle. In *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), this Court clearly stated that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." The breadth of the class benefitted also served as a vital distinction between the tuition assistance invalidated by this Court in *Committee*

⁶The court below relied on the formulation of the secular use limitation developed by this Court in *Hunt v. McNair*, 413 U.S. 734 (1973), and particularly on the second prong which prohibited funding of "a specifically religious activity in an otherwise substantially secular setting." *Id.* at 743. As further discussed below, this test must be taken as limited to the school-aid context in order to give effect to this Court's decisions with regard to public benefit programs. See, e.g., *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 747 (1976).

for *Public Education v. Nyquist*, 413 U.S. 756 (1973), and the tuition deduction upheld by this Court in *Mueller v. Allen*, 77 L.Ed.2d. 721, 731 (1983). Unlike the public assistance in *Nyquist*, which was available *only* to parents of students in private schools, the tuition deduction at issue in *Mueller* was available to *all* parents regardless whether their children attended private or religious schools. *Id.* at 731.

Despite the inclusion of parents of public school children in the *Mueller* plan, "the vast majority of the taxpayers who [were] eligible to receive the benefit [were] parents whose children attended religious schools." *Id.* at 734 (Marshall, J., dissenting). The program, therefore, fell somewhat short of being a pure public benefit program. On the other hand, the inclusion of parents of children attending public schools did serve to differentiate the case from the traditional form of the school-aid case. *Mueller* thus stands as a link between the cases comfortably within the traditional public benefit analysis and the school-aid cases applying the secular-use limitation.

If the breadth of the class of beneficiaries in *Mueller*, which dealt with what might be termed a quasi-public benefit program, served to vitiate any conflict between that program and the Establishment Clause, then *a fortiori*, the breadth of the class of beneficiaries in the present case, which involves a paradigmatic public benefit program, ought to place the vocational assistance to Petitioner safely beyond constitutional challenge.

2. APPLYING THE SECULAR-USE TEST TO NEUTRAL PUBLIC BENEFIT PROGRAMS WOULD EXTEND THE REACH OF THE ESTABLISHMENT CLAUSE TO ALL FORMS OF SOCIAL WELFARE PROGRAMS, INCLUDING SOCIAL SECURITY BENEFITS, G.I. BILL PAYMENTS, AND FEDERAL STUDENT LOANS, THUS CONVERTING THE CLAUSE INTO A SWORD AGAINST RELIGION.

The secular-use test, which furthers neutrality in the context of aid to a religious school, plainly undermines neutrality when applied to a true public benefit program, such as the one at issue in this case. Indeed, the court below conceded that the program was neutral in its overall effect, but, analyzing the assistance to Petitioner independently of the program itself, determined that permitting such religious use of state funds violated the Establishment Clause. *Witters v. State Commission for the Blind*, 689 P.2d at 256.

The notion that the Establishment Clause absolutely bars any religious person from using benefits obtained pursuant to neutral, general welfare legislation has far-reaching implications. For example, Social Security benefits and G.I. Bill payments could no longer be put to religious use by religious persons. Similarly, such a construction of the Establishment Clause would seem to place in doubt the constitutionality of federal student loans to students in divinity or theology programs at otherwise secular universities. Indeed, the use of public facilities by religious groups on the same basis as other groups, although clearly sanctioned in *Widmar v. Vincent*, would not be permitted under the logic advanced by the lower court.

The reach of the Establishment Clause, under the approach suggested by the Washington Supreme Court,

would be virtually limitless. Thus unsheathed, the Clause would become a "sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Given the ubiquitous reach and influence of state and federal governments, the hermetic separation urged by Respondent and endorsed by the lower court would have the effect of driving religion from virtually every sphere of societal activity. The Establishment Clause would then operate as a license to subject religious groups or individuals "to unique disabilities." *Id.*

Although Respondent may urge that the decision of the court below is narrow and limited only to the use of government funds for religious education, as opposed to other religious uses, there is nevertheless no constitutional basis for such a distinction. *Mueller v. Allen*, 77 L.Ed.2d 721 (1983). Moreover, the interpretive problems that would arise in determining whether a particular use constituted a religious use would pose a grave risk of "entanglement".⁷ As this Court recognized in *Widmar v. Vincent*, "[t]his alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." 454 U.S. at 272, n.11; cf. *Malnak v. Yogi*, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd per curiam*, 592 F. 2d 197 (3rd Cir. 1979). It was for precisely this reason that this Court refused to permit state inspection and evaluation

⁷The approach taken by the Washington Supreme Court would seem to require the State to determine what constitutes "religious use" of the State's funds. Would the taking of theology courses, as a part of a humanities program at a secular university, constitute a forbidden religious use? The focus of the court below on the use of benefits by recipients rather than on the nature of the program itself necessarily leads to such entangling and imponderable questions.

of parochial school expenditures in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

3. THE SECULAR-USE TEST SHOULD BE RESTRICTED
TO TRADITIONAL SCHOOL-AID CASES AND
SHOULD NOT BE APPLIED TO THE STATE
OF WASHINGTON'S PROGRAM MERELY
BECAUSE SOME ASSISTANCE FLOWS
ULTIMATELY TO A RELIGIOUS INSTITUTION.

The conflict between the Establishment Clause and social welfare programs arises from attempting to apply the secular-use limitation outside of its proper context as a limitation on the provision of aid to a religious school. It might be argued that the present case involves indirect aid to a religious school and is, therefore, an appropriate occasion for invocation of the secular-use test. But the mere fact that some aid may ultimately trickle down to a religious institution, or be applied to religious education, does not vitiate the public character of an otherwise neutral program.

The public character of the program derives from the broad class of beneficiaries and is logically unrelated to the particular use of the assistance made by any given religious member. Religious education is not a talisman which automatically taints the constitutional quality of public assistance. Indeed, this Court indicated in *Mueller v. Allen*, 77 L.Ed.2d 721, 730 (1983), that a scholarship program modelled after the tuition deductions approved in that case might well pass constitutional muster.

Moreover, with the exception of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), all of this Court's recent decisions invalidating state aid to religious schools have involved "the direct transmission of assistance from the state to the schools themselves."

Mueller v. Allen, 77 L.Ed.2d at 731. The spectre that individuals will be indirectly used as conduits through which massive amounts of aid will be channelled to religious schools is not present in this case. The attenuated benefit that a religious institution might derive from Petitioner's participation in Washington's vocational assistance program is manifestly not one of "the evils against which the Establishment Clause was designed to protect." *Id.* To borrow from this Court's observations in *Mueller*, "the historic purposes of the Clauses simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices" of a few blind students, that "eventually flows to parochial schools from the neutrally available" vocational assistance at issue in this case. *Id.*

Petitioner's application of vocational assistance toward certain religious studies does not convert this into a school-aid case. The secular-use limitation is, therefore, wholly inappropriate. The considerations that make it reasonable to apply the secular-use limitation in the context of aid to religious schools are simply not present in this case.

D. THE DECISION OF THE WASHINGTON SUPREME
COURT IS IRRECONCILABLE WITH THIS COURT'S
DECISIONS UPHOLDING NEUTRAL PUBLIC
BENEFIT PROGRAMS AND REPRESENTS
A SIGNIFICANT STEP TOWARDS A
SECULARISM INCONSISTENT WITH THIS
NATION'S RELIGIOUS HERITAGE.

This Court has repeatedly emphasized that incidental benefits to religion flowing from public welfare legislation are consistent with the Establishment Clause. *See, e.g., Mueller v. Allen*, 77 L.Ed.2d at 726-27. Indeed, government action in singling out and excluding religious persons from public benefits violates the Establishment Clause which prohibits not only government action that

advances religion, but also government action that inhibits it. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The neutral course between these two extremes may at times be difficult to chart, but the action of the Commission in the instant case—denying a blind man vocational assistance because he engages in certain religious studies—falls outside the realm of legitimate speculation about the aims of the Establishment Clause. Such action represents manifest hostility toward religion, “preferring those who believe in no religion over those who do believe.” *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 225 (1963), quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Amici believe that the decision of the court below is consonant with the views of some that the Establishment Clause requires the secularization of American society. A decision by this Court upholding the denial of assistance to Petitioner would be interpreted by many as validating this thesis. Moreover, it could well be interpreted by public administrators and others in public authority as a mandate to remove all religious influence from the public sphere.

II.

The State of Washington's Denial of Public Benefits To Petitioner On Account Of His Intent To Become A Minister Establishes An Unconstitutional Condition Upon The Exercise Of Religious Liberty.

The Free Exercise Clause prohibits the State from denying public benefits because of conduct mandated by religious belief, or from conditioning the availability of a public benefit upon conduct proscribed by religious belief. *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981). The free exercise of religion encompasses not only the right to believe, but also the right to seek ex-

pression of that belief in a career as a minister. *McDaniel v. Paty*, 435 U.S. 618, 631 (1978) (Brennan, J., concurring). The State in this case denied Petitioner the benefits of its general welfare program specifically because he was preparing for a career as a pastor, missionary, or youth director. This imposition of a special burden upon the exercise of a fundamental religious right plainly violates the Free Exercise Clause.

This Court has rejected the argument that a legitimate distinction can be drawn, for Free Exercise Clause purposes, between religious belief and the expression of that belief in a career or calling. *Id.* at 626-27. Indeed, it would be risible to suggest that the right to believe ceases “to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.” *Id.* at 631 (Brennan, J., concurring).

The denial of vocational assistance to Petitioner establishes a religious classification governing the availability of vocational assistance virtually identical, except for the form of the benefit at issue, to the classification invalidated by this Court in *McDaniel v. Paty*, 435 U.S. 618 (1978). In *McDaniel*, this Court struck down a provision of the State of Tennessee that made status as a minister a disqualifying factor for those seeking public office. This Court rejected the State's argument that the choice of a career as a minister was somehow less protected than religious belief itself. *Id.* Therefore, the classification established by the State of Washington disqualifying those seeking to become ministers from assistance under its program plainly constitutes a forbidden religious classification under the rule announced by this Court in *McDaniel*.

The difference in the type of benefit, financial assistance in this case and eligibility for public office in *McDan-*

iel, does not compel a contrary conclusion. This Court has held in several cases that the State cannot condition the availability of financial benefits upon violation of religious faith. *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981) (unconstitutional to condition availability of unemployment compensation upon violation of religious faith); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (Same). The financial pressure placed upon Petitioner to forego his religious studies and perhaps even to seek a different career is unmistakable. Such pressure constitutes an unconstitutional burden upon religious exercise. "When the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas v. Review Board*, 450 U.S. at 717-18.

As this Court has recognized, the freedom to engage in religiously impelled ministry involves the essence of religious liberty. *McDaniel v. Paty*, 435 U.S. at 626. The State has placed Petitioner in the untenable position of having either to relinquish this freedom and thus "violate a cardinal principle of his religious faith," or else to forfeit the benefits otherwise available under the State of Washington's vocational assistance program. *Id.* Therefore, the denial of benefits to Petitioner violates the Free Exercise Clause.

III.

The Commission's Denial of Benefits For Religious Reasons Constitutes Invidious Discrimination Against Petitioner In Violation Of The Equal Protection Clause Of The Fourteenth Amendment.

When fundamental and personal rights are at stake, this Court has subjected state classification of persons and objects to strict scrutiny. In the early case of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), this Court recognized that laws involving the right to vote, restraints on free speech, interference with political organizations, freedom of assembly, and discrimination against religious, national or racial minorities, require a "more searching judicial inquiry" under the Equal Protection Clause.

Since that time, the Court has identified certain classifications as "suspect" and others involving "fundamental rights," both of which are subjected to "strict scrutiny" by the Court and require a showing that there is a compelling state interest "necessary to the accomplishment of some permissible state objective." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Classification in the area of race, religion and nationality have been deemed suspect because they affect discrete and insular minorities.⁸

Likewise, even though a law may be designed to serve neutral ends, if it is applied in a manner to discriminate on otherwise impermissible constitutional grounds, or if its impact or effect constitutes an equal protection viola-

⁸*Strauder v. West Virginia*, 100 U.S. 303 (1880); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Widmar v. Vincent*, 454 U.S. 263 (1981).

tion, then the statute as applied may be held unconstitutional. The classic statement of this principle was in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In that case, the supervisors of the County and City of San Francisco were empowered in their discretion to regulate the operation of laundries in wooden buildings, while laundries operating in brick or stone structures were not subject to regulation. Consent to operate wooden laundries was given to non-Chinese subjects, but withheld from Chinese subjects. The Court stated:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-374.

The equal protection principles set forth above clearly apply in the context of a public benefit case. As recently as *Zobel v. Williams*, 457 U.S. 55 (1982), this Court recognized that "when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 60. Because the discrimination here is based on religion, the state must demonstrate a compelling state interest for the distinctions drawn between beneficiaries.

In this regard, *Widmar v. Vincent*, 454 U.S. 263 (1981), is helpful as a framework for analysis. There, a state discriminated against students' use of public facilities based on the religious content of their intended speech. This Court required the state to demonstrate a compel-

ling state interest for its denial of use of the facilities. *Id.* at 267-270. The state's compliance with its Establishment Clause obligations failed to provide a sufficiently compelling state interest to justify the discrimination imposed against the students. *Id.* at 276.

In order for Establishment Clause obligations to be considered compelling in the present case, the Respondent must show, as in *Widmar*, that a public benefit program without a religious exclusion would violate the tripartite test found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *Widmar v. Vincent*, 454 U.S. at 271. Applying this test, it is clear that the Establishment Clause does *not* compel Respondent to draw the distinction that it has drawn. First, there would be an obvious secular legislative purpose for the public benefits provided, i.e., to educate the blind and make them self-reliant and productive citizens of society. Second, the primary effect of the benefits would not be the advancement of religion, but the education of the handicapped. Any benefit to religion would be strictly "incidental." Benefits would accrue to *all* eligible persons, religious and nonreligious. Their use would depend upon private, individual choices, not upon state action or influence. It is difficult to discern any "imprimatur" of state approval of religion arising from such a program. In the absence of "empirical evidence" that benefits will be awarded predominantly to religious persons for religious uses, the primary effect of the program cannot be considered to be other than purely secular in nature. *Id.* at 275.

Finally, as this Court noted in *Widmar*, there is actually a greater risk of impermissible "entanglement" by excluding "religious" uses of public benefits. *Id.* at 272, n.11. What constitutes a "religious" use? Who will monitor and prevent such uses? Conversely, the neutral provision of benefits on an *equal* basis to *all* eligible

persons, regardless of their personal choices as to the use of such benefits, creates no entanglement problem.

It is, therefore, inconceivable that the state's Establishment Clause obligations in this case exceed those advanced in *Widmar*. There being no compelling state interest, the discrimination against Petitioner rests on impermissible constitutional grounds and must be invalidated by this Court.

CONCLUSION

Clearly, "[t]he purpose of the establishment clause was not to extirpate religion from public life." Comment, *Secularism in the Law: The Religion of Secular Humanism*, 8 Ohio N.U.L. Rev. 329 (1981). The mind frame of those who directed the constitutional era and the drive toward separation of church and state "was, in some respects, anti-clerical, as a result of Papism, Cromwellism, etc., but never antireligious, so that some interrelating and intermeshing of state and religion have always been with us." Forkosch, *Religion, Education, and the Constitution—A Middle Way*, 23 Loyola L.Rev. 617, 632 (1977).

The Washington Supreme Court decision runs contrary to this central historical and political truth. It could lead to the exclusion of religious persons from many, if not most, areas of public life. It is tantamount to a *de facto* establishment of what this Court has previously identified as a "religion of secularism." *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 225 (1963). See also Gianella, *Religious Liberty, Nonesestablishment and Doctrinal Development*, 81 Harv. L.Rev. 513, 586-587 (1968) and *Torasco v. Watkins*, 367 U.S. 488, 495, n.11 (1961). As Harvard professor Harvey Cox has noted, secularism is an "ideology, a new closed world view which functions very much like a new

religion . . . It is a closed ism." H. Cox, *The Secular City* 18 (1965). It is a menace to freedom because it "seeks to impose its ideology through the organs of the State." *Id.*

The decision of the Washington Supreme Court conflicts with vital constitutional freedoms. It is, therefore, essential that the conflict be resolved in favor of the Petitioner.

Respectfully submitted,

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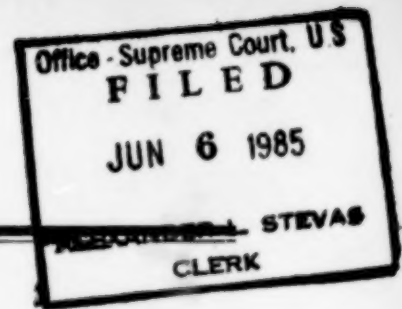
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No. 84-1070



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

LARRY WITTERS,
Petitioner,
v.

STATE OF WASHINGTON COMMISSION FOR THE BLIND,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF CHRISTIAN LEGAL SOCIETY AND
NATIONAL ASSOCIATION OF EVANGELICALS
AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment permits discriminatory exclusion of an individual from neutral state programs solely on account of that individual's religious belief, status or vocation.

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IN THE
Supreme Court of the United States

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 LARRY WITTERS,

v.

Petitioner,

STATE OF WASHINGTON COMMISSION FOR THE BLIND,
Respondent.

 On Writ of Certiorari to the Supreme Court of Washington

 BRIEF OF CHRISTIAN LEGAL SOCIETY AND
 NATIONAL ASSOCIATION OF EVANGELICALS
 AS AMICI CURIAE SUPPORTING PETITIONER

 INTEREST OF THE AMICI CURIAE

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys, law professors, and law students. Today it includes over 3,500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect and promote the freedom of Christians and other persons in the exercise of their religious beliefs.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, colleges, and universities, as well as some 36,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates. Both organizations have advocated the neutral treatment of religious persons by government.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT

Amici curiae adopt and incorporate by reference the statement of the case appearing in the brief filed by petitioner Larry Witters.

SUMMARY OF ARGUMENT

Petitioner Larry Witters was denied government education benefits under a vocational rehabilitation program for the blind solely because of his desire to use those benefits to pursue a theological education and enter the Christian ministry. The Washington Supreme Court erred in holding that the First Amendment to the United States Constitution permits such discriminatory exclusion of religious persons from a neutral state program.

A program, like Washington's vocational rehabilitation program for the blind, "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983). Such a program does not become more susceptible to challenge merely because one of its beneficiaries employs the benefits to pursue religious education and professional training of his own choosing, free from government coercion or influence. *See id.* at 399-401. Quite the contrary, to withhold benefits generally available to a class of citizens,

solely on account of an individual's religious beliefs or occupation, violates the First Amendment's protections of religious liberty. *Thomas v. Review Board*, 450 U.S. 707 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978) (state constitutional provision prohibiting clergy from holding public office violative of federal Free Exercise Clause). Moreover, it is simply wrong in principle to read the Establishment Clause as requiring religious discrimination which the Free Exercise Clause prohibits. In this case, the Free Exercise and Establishment Clauses work in complete harmony to protect identical interests: religious liberty and equality.

Neither can such discriminatory treatment of religious persons by government be justified by a state's desire for an even more rigid separation of church and state than the First Amendment requires. *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981); *McDaniel*, 435 U.S. at 621. Even if the Washington state constitution were interpreted to prohibit neutrally administered financial aid to eligible blind persons, it could not justify religious discrimination prohibited by the federal Constitution. U.S. Const. art. VI, § 2. Therefore, no independent state law ground capable of sustaining the judgment below exists, and remand for determination of state constitutional issues is not necessary.

ARGUMENT

I. The State of Washington's Denial of Vocational Rehabilitation Benefits to Mr. Witters Solely Because of His Desire to Pursue A Religious Vocation Violates the Religious Liberty Protected By the Free Exercise and Establishment Clauses of the First Amendment.

Unlike cases where this Court has observed an apparent "tension" between the Establishment and Free Exercise Clauses of the First Amendment, in the instant case the two clauses protect interests in religious liberty that completely *converge*, not that conflict. Both clauses protect religious liberty, though in slightly different ways. The Establishment Clause protects religious freedom by prohibiting government coercion, through favoritism or hostility, in matters of religious practice or belief. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (primary effect of enactments "must be one that *neither advances nor inhibits* religion" (emphasis added)). The Free Exercise Clause prevents government from prohibiting, penalizing or disfavoring the exercise of sincerely held religious beliefs.

The two clauses completely coincide when the claimed violation of free exercise is governmental coercion in the form of improper discrimination against persons who engage in religious exercise or pursuits. The applicable principle, firmly established by this Court's cases, is that a government policy, classification or program must have neither the purpose or effect of advancing or inhibiting the free exercise of any particular religion relative to any other religion or relative to the non-exercise of religion. Accordingly, we believe that petitioner's various claims constitute a unitary package, involving a single claim of infringement of the religious liberty protected by both clauses of the First Amendment. See *McDaniel*, 435 U.S. at 629-30 (Brennan, J., concurring in the judgment) (Tennessee clergy disqualification law "violates

both the Free Exercise and Establishment Clauses of the First Amendment . . .").¹

A. The First Amendment prohibits denial of neutral public benefits because of an individual's religious belief, status, or vocation.

It is well established that "liberties of religion and expression may [not] be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). That the benefit is one the State is not obliged to bestow is of no consequence. Having elected to grant financial assistance to a class of persons, as Washington has done here with the blind, the State must not adopt a reverse-religious "test" as a condition of eligibility. See *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment); cf. *Torcaso v. Watkins*, 367 U.S. 488 (1961). This Court has likened such conditions to the imposition of a tax or fine upon religious expression or activity. *Sherbert*, 374 U.S. at 404 (conditions upon public benefits place same kind of burden on exercise of First Amendment freedoms as a "fine" on that religious exercise); *Speiser v. Randall*, 357 U.S. 513

¹ Though petitioner pressed a separate equal protection claim below, the claim is intimately related to the Religion Clauses. Indeed, many of this Court's opinions in Religion Clause cases have looked most prominently to factors of equality and neutrality. See, e.g., *Wallace v. Jaffree*, slip op. No. 83-812 (June 4, 1985) (legislative acts must not intend to communicate government message of endorsement or disapproval of specific religious practices); *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982) (under clear command of Establishment Clause, laws are "suspect" and require "strict scrutiny" if they officially prefer or disfavor any religious denomination); *McDaniel v. Paty*, 435 U.S. at 643 (White, J., concurring in the judgment) (clergy disqualification violates equal protection clause); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring) (prohibition of only certain worship services in public park violates equal protection). It is thus possible to think of the Establishment Clause as providing for the equal protection of the liberties bestowed by the Free Exercise Clause, which include the freedom of belief, worship, and practice as well as the freedom not to exercise any religion.

(1958) (deterrent effect of conditioning tax benefit upon loyalty oath "is the same as if the court were to fine [persons] for their speech."); *First Unitarian Church v. Los Angeles*, 357 U.S. 545 (1958) (same as to churches). Most recently, this Court reaffirmed the longstanding principle that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available program." *Thomas v. Review Board*, 450 U.S. 707, 716 (1981).

Indeed, petitioner's free exercise claim is even stronger than those urged in *Sherbert* and *Thomas*. In those cases, the religious claimant sought special exemption or dispensation from laws of general applicability. See *Thomas*, 450 U.S. at 720 (Rehnquist, J., dissenting). Here, petitioner seeks only to be treated as all others under a program of general applicability. He is not asking for special treatment because of his religious beliefs, only equal treatment regardless of his religious beliefs.

The State of Washington has put Mr. Witters to the exact choice prohibited by this Court's decisions. Mr. Witter's choice to become a Christian minister is undeniably part of the Constitution's protections of religious liberty. As this Court held in *McDaniel*, "[t]he right to the free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions or, in other words, to be a minister of the type *McDaniel* was found to be." 435 U.S. at 626. While, strictly speaking, Mr. Witters' religious beliefs may not have required that he become a minister,² the First Amendment unequivocally protects his choice to do so. See *McDaniel*, 450 U.S. at 626 (equating *McDaniel*'s "religiously impelled ministry" with "cardinal principle of [his] religious faith"); *id.* at 630 (Brennan,

² In most Christian denominations, the ministry is thought of as a special "calling" for service. While not all members of a sect or denomination are called to enter the clergy, the decision to enter the professional ministry is scarcely one divorced from a sense of religious obligation.

J., concurring in the judgment) (no constitutionally valid distinction between "religious belief or religious action" and "career or calling" of the ministry). The Washington Supreme Court was plainly wrong in concluding that "[t]he Commission's decision may make it financially difficult, or even impossible, for appellant to become a minister, but this is beyond the scope of the free exercise clause." 102 Wash. 2d at 631, 689 P.2d at 57.

The state imposes on Mr. Witters a dilemma of life-changing magnitude: participation in an "otherwise available program" of vocational rehabilitation or training for the ministry without the financial assistance given all other blind students. The state would not impose this dilemma on him were he to pursue any other professional goal. What this Court has on other occasions called a "fine" might here be best labelled a "bribe". The state is essentially bribing Mr. Witters to pursue any other profession than that of being a clergyman. The cost of refusing this bribe is the deprivation of important financial benefits for education and vocational rehabilitation. Mr. Witters' choice of the professional ministry as a vocation was literally singled out for exclusion from the program's general availability. It is difficult to think of a clearer modern-day example of what James Madison termed "punishing a religious profession with the privation of a civil right." 5 *Writings of James Madison* 288 (6 Hunt. ed. 1904), quoted in *McDaniel v. Paty*, 435 U.S. at 626. The First Amendment certainly does not permit such raw discrimination.

B. The Establishment Clause does not compel discrimination against religious individuals in state provision of broadly available financial benefits, but instead prohibits religion-based discrimination.

The First Amendment's protections of religious exercise do not permit unique deprivations of general benefits due to an individual's religious activity. Most disturbingly, the court below held that the First Amendment re-

quires such a result. Such a holding is predicated on a seriously flawed reading of the Establishment Clause. This Court's cases emphasize the overriding principle of governmental neutrality toward individual religious activity, reflected in both the original understanding of the Amendment's framers and the proper application of the tripartite test.

1. *The dominant principle of governmental neutrality toward individual religious activity.* The Establishment Clause is not hostile to religious exercise nor to religious individuals. It is hostile to governmental favoritism toward any given religious exercise or non-exercise and to governmental discrimination against any religious adherent or nonadherent. *Cf., Lynch*, 104 S. Ct. at 1366 (O'Connor, J., concurring). Such neutrality is often best achieved by separation. However, the Establishment Clause never requires absolute separation at the expense of governmental neutrality. In a complex, modern society in which government plays an increasingly active role, a policy of uncompromising "absolute separation" ceases to be one of neutrality and becomes one of hostility. *See Lynch*, 104 S. Ct. at 1359.

In recognition of this reality, this Court has held consistently in contexts similar to the instant case that programs "that neutrally provide[] state assistance to a broad spectrum of citizens [are] not readily susceptible to challenge under the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983); *accord Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981). That some citizens may, in turn, use neutrally provided state assistance to pursue religious education or religious goals of their own choosing does not affect the constitutional validity of the program as a whole. Under *Mueller*, the validity of an aid program is reinforced by the fact that whatever dollars may flow to religious institutions do so only indirectly and through the voluntary private choices of individuals. Individual choices, which in the aggregate es-

tablish a program's validity, cannot at the same time violate the Establishment Clause when taken one at a time. Yet this is precisely the methodology employed by the Washington Supreme Court in the instant case. This type of approach, however, was expressly disapproved in *Lynch*, where this Court recognized that to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 104 S. Ct. at 1362.³

The Establishment Clause is a limitation on state rather than private action and, therefore, does not bar the provision of neutral benefits to private individuals, even when they may use them toward religious ends. If religion is somehow "advantaged" as a biproduct of neutral treatment, such advantage flows not from government edict but from a neutral policy "that lets each [group] flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

To characterize neutral aid to blind students as government "subsidization" of religious enterprises, activities, or education begs the question in chief: Whether allowing individuals to use otherwise available education benefits to pursue education toward a religious vocation on the same terms as any other vocation constitutes favoritism by government of religion, or active financial "sponsorship" of religion by government in any constitu-

³ The court below seriously misread this Court's statement in *Hunt v. McNair*, 413 U.S. 734, 742 (1973), that to identify a program's primary effect "we narrow our focus from the statute as a whole to the only transaction presently before us." The Washington court misunderstood this directive as suggesting that the "effects" inquiry be narrowed from a program to an individual, rather than from the statute facially to specific programs implementing a statute. *Hunt* refers only to the latter. The proper inquiry is thus not Washington's statutory authorization for vocational rehabilitation but the vocational rehabilitation program as it operates in general rather than in each specific case.

tionally meaningful sense. Unquestionably, government dollars eventually flow to a religious institution. But such a result is unconstitutional only if an absolute separation is to be promoted at the expense of equal treatment of persons with religious motivations or career ambitions.

2. *Original understanding of framers.* The Establishment Clause is a safeguard against governmentally compelled or induced exercise of religion by means direct or indirect, one of which might in practice prove to be financial *in form*. But the clause itself is not concerned primarily with money but with *equal liberty*.

Suggestions to the contrary may be predicated on a misreading of history, especially of James Madison's celebrated *Memorial and Remonstrance Against Religious Assessments* (see *Everson v. Board of Education*, 330 U.S. 1, 63-72 (1947) (Appendix to Dissent of Rutledge, J.)). While the *Remonstrance* has been cited for the proposition that tax dollars may never be used in any manner which benefit religion, see, e.g., *Flast v. Cohen*, 392 U.S. 83, 103-105 (1968); *Everson*, 330 U.S. at 33-37 (Rutledge, J., dissenting), a close examination of the context in which the familiar "three pence" remark occurs reveals its true role in Madison's argument. Madison's first two paragraphs concern the nature of the right of religious freedom and the absence of government jurisdiction to intrude upon it. In his third paragraph, Madison employs a slippery-slope illustration to support his attack on proposed compulsory tithes to finance training in an official religious orthodoxy (albeit one considered "benign" and liberal by many of his contemporaries) as an eventual threat to religious liberty:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property

for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

330 U.S. at 65-66.

Being asked to pay "three pence" to support religious education was not itself the feared result, but compelled conformity in matters of religious exercise. Focus on the "three pence" phrase as a shorthand quip misrepresents Madison's central animating thesis of *equality* in the exercise of religious liberty, summarized in the very next paragraph:

Above all are men to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of conscience,' A just government . . . will be best supported by protecting each citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

330 U.S. at 66 (quoting Article I of Virginia Declaration of Rights, emphasis of Madison).

Nothing like the modern welfare state was remotely envisioned by Madison, a consideration which should not be lightly disregarded. Eighteenth century Virginians knew no broad-based government aid programs funded through tax revenues and administered by large bureaucracies as quasi-entitlements. See *Sherbert*, 374 U.S. at 404-5, n.6. Madison's *Remonstrance* was directed against a practice radically different in its context than the one at issue today. Given his powerful arguments for equality of religious liberty, it is hard to maintain that Madison's *Remonstrance* supports the position that religion alone should be excluded systematically from the broad-based financial benefits of the welfare state. Quite the contrary, to paraphrase Madison's words on another occasion, such unique exclusions would seem to punish

religious individuals with the privation of civil rights. See *McDaniel*, 435 U.S. at 626.

Several years later when he first proposed the draft federal Religion Clauses, Madison responded to fears that the Establishment Clause might be interpreted in a way that would be "extremely hurtful to the cause of religion." 1 *Annals of Congress* 758 (Aug. 15, 1789) (J. Gales ed. 1834) (remarks of Rep. Huntington); see also *id.* at 757 (remarks of Rep. Sylvester). He confirmed that "the object [the Establishment Clause] was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform". *Id.* at 758-59; see also *id.* at 758. The result reached below, reading the clause to require special disfavoring of religion, thus appears *directly contrary* to the original understanding of the framers.

3. *Proper application of the tripartite test.* A fair application of the tripartite test demonstrates that the religious discrimination which the court below thought mandated by the Establishment Clause is in fact prohibited by that clause. The Washington program's obvious secular purpose and primary effect are to provide blind persons with benefits to pursue vocational rehabilitation or professional training of their own choosing, consistent with their natural abilities and physical limitations. By contrast, denial of benefits to petitioner because of his choice of a religious vocation has the primary effect of inhibiting the exercise of an important religious freedom. See *McDaniel*, *supra*. Such denial is an invidious religious classification, literally singling out the professional ministry for disparate and adverse treatment. *Id.*

The program attains its goal through the means least entangling with religious institutions; money flows to educational organizations only through the private, voluntary choices of individuals. This Court has found a

constitutional allowance of aid to individuals who may choose to use funds at religious institutions, rather than potentially more entangling programs of direct aid to religious institutions. Compare, e.g., *Mueller*, 463 U.S. 388; *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947), with *Lemon*, 403 U.S. 612; *Meek v. Pittenger*, 421 U.S. 349 (1975). But see, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

Indeed, if affirmed by this Court, the decision below would hopelessly entangle government in the operations of religious organizations and the expenditures of religious individuals, requiring continuous monitoring and supervision of the religious choices of private parties to make sure that government benefits did not ultimately further their private, religious ends. If the decision of the court below were affirmed, the use by a student of Guaranteed Student Loans or Veterans Benefits to attend divinity school rather than law school, or to pursue an undergraduate major in religious studies rather than political science, may also be unconstitutional. To permit such challenges would force government into the business of monitoring the religious behavior, intentions, and spending patterns of beneficiaries of its programs, to make certain that government funds are not used, however indirectly, to further the religious element, rather than only "secular" elements, in an individual's life. One bristles at the prospect of a standard government form requiring, as a condition for receipt of federal student aid, a promise from the student attending a church-supported college that he not be influenced by such an educational environment to consider entering the ministry or becoming a missionary. A more intrusive and pernicious "entanglement" is difficult to imagine.

Thus, the Establishment Clause as well as the Free Exercise of Religion Clause prohibits the discriminatory treatment of religious persons. This Court should repudi-

ate the fundamentally flawed understanding of the Establishment Clause contained in the erroneous decision of the Washington Supreme Court.

II. The First Amendment's prohibition on governmental discrimination against religious persons supercedes state constitutional provisions which may be interpreted to require such discrimination.

No independent state ground adequate to support the judgment below exists and, therefore, remand for a determination of the precise scope of the state constitutional provision is not needed. Assuming *arguendo* that Article I, § 11 of Washington's constitution would otherwise prevent the use of vocational rehabilitation funds by Mr. Witters for a theological education, such a finding would nonetheless be forced to yield to the First Amendment's prohibition of religion-based discrimination. U.S. Const. art. VI, § 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."); see *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981) (state interest in achieving greater separation than ensured by federal Establishment Clause limited by federal Free Exercise Clause); *McDaniel*, 435 U.S. at 621 (same) (state constitutional provision struck down).⁴

The Washington Supreme Court squarely denied petitioner's free exercise claim: "We hold that the Commission's refusal to provide financial assistance did not vio-

⁴ This Court need not address the issue of whether the fact that the vocational rehabilitation program is predominantly funded by the federal government (80 percent) vitiates the adequacy of any asserted state ground to deprive petitioner of all benefits under the program.

late the Free Exercise Clause of the federal constitution." 102 Wash. 2d at 631, 689 P.2d at 57. The court's holding on the free exercise claim was in no way conditioned upon its view that the Establishment Clause required Mr. Witter's exclusion from the program. Were this Court to reverse only the holding that the Establishment Clause does not require such an exclusion, the Washington Commission for the Blind's policy forbidding assistance to an individual pursuing a career or degree in theology or related areas would be left standing. If petitioner is to obtain any relief, reversal of the denial by the court below of petitioner's free exercise claim is essential. Otherwise, the Commission will be deprived only of a shield it does not need, if petitioner has no affirmative constitutional claim with which to contest its action and its policy. Petitioner should not be forced to petition this Court anew on a free exercise issue already contained in the present petition and in the case as it comes before this Court.

CONCLUSION

Accordingly, *amici curiae* urge this Court to reverse the judgment of the court below.

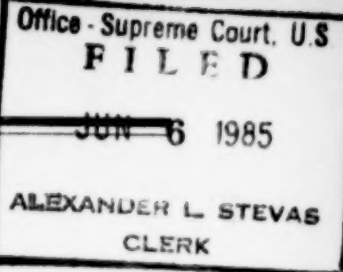
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No. 84-1070



IN THE
Supreme Court of the United States
October Term, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

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**BRIEF AMICUS CURIAE OF THE
AMERICAN JEWISH CONGRESS**

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Interest of the Amicus

The American Jewish Congress is an organization of American Jews, founded in 1918, dedicated to the protection of the religious, political, civil and economic liberties of all Americans, but particularly those of American Jews. No liberty enjoyed by Americans is more important to American Jews than religious liberty. For this reason, the American Jewish Congress has filed many briefs in this Court and elsewhere in cases raising religious liberty issues.

The principle of non-establishment, enshrined in the First Amendment, is an indispensable element of religious liberty. Hence, AJCongress has repeatedly urged that the Establishment Clause be given a generous construction. It has appeared repeatedly before this Court urging the invalidation of statutes intended to provide subsidies for religious education. But the Establishment Clause, more so perhaps than other

constitutional principles, must not be expanded indefinitely, for to do so inevitably leads to clashes with that other guarantee of religious liberty, the Free Exercise Clause.

After careful study, AJCongress believes that the Supreme Court of Washington has interpreted the Establishment Clause too expansively in this case. It is filing this brief both to express those views, and to propose an analysis of this case which leaves intact this Court's Establishment Clause jurisprudence.

The brief is filed with the consent of the parties.

FACTS

The facts of this case are simple. Petitioner Larry Witters, who is blind, has been found eligible for vocational rehabilitation under a Washington statute, Rev. C. Wash. § 74.16.181 (1985), providing for funding to blind persons "so that they can be trained to engage in gainful employment and become self-supporting" (Decision of Office of Hearings, Washington Department of Social and Health Services, App. F-2).

Witters' application was denied by the Washington State Department of Social and Health Services* (hereafter "Department") on the sole ground that he intended to use the funds to pay for ministerial training at a school of theology. The Department found that payments under these circumstances would

* The Department has since been renamed the Department of Services for the Blind, Brief in Opposition to the Petition for a Writ of Certiorari at 1, n.1.

violate the Washington State Constitution, Art. IX, § 4; Art. I, § 11. [App. F-2]. That decision was in turn upheld by both an administrative law judge, [App. E-1], and the trial court [App. C-1 and D-1].

The Washington Supreme Court refused to pass on the state constitutional issues [App. A-2]. Instead, it held that granting Witters' request would violate the Establishment Clause of the First Amendment to the United States Constitution. It also held that Witters' Free Exercise Clause rights were not violated by the denial of benefits on the sole ground that he wished to use them at a school of theology [App. 1A-2]. One judge dissented [App. B-1].

This Court granted certiorari, 53 U.S.L.W. 3702 (1985).

Summary of Argument

1. Both the Establishment and Free Exercise Clauses are indispensable for the

protection of religious liberty, and they must be understood as part of a whole, so that one does not dominate the other, and distort the American notion of religious liberty.

2. Non-establishment, as manifest particularly in the prohibition on financial aid to religious institutions, is an essential element of religious liberty. So is the guarantee of free exercise which protects not only the right to believe but the right to practice one's faith without penalty.

3. Where these principles clash, as will happen not infrequently in a 20th century government, the Court should balance the interests protected by each Clause to determine which of the two religion clauses is more strongly implicated.

4. Because the Establishment Clause was drafted, in large part, to prevent government from taxing citizens to support

churches, any direct payment to a church or religious educational institution raises Establishment Clause concerns. Since payment of Witters' tuition is such a payment, it follows that the Establishment Clause is solidly implicated in this case.

5. Nevertheless the significance of that fact is mitigated by several factors which gain significance in light of current conditions.

a) Only those practices which substantially advance religion are unconstitutional. In comparison with other practices upheld or invalidated by this Court, Witters' case falls on the permissible side, particularly since it does not enhance the role of religion vis-a-vis other social forces.

b) The benefit conferred on Witters is available for a "broad spectrum" of vocational programs, and only as the result of private choice. There is thus little

risk that any of the four dangers the Establishment Clause was designed to forestall will occur. There is here no

i. evidence (or even likelihood) of religious coercion;

ii. likelihood that religious institutions will become overly dependent on government because available funds may be used in a wide variety of institutions, solely as the result of independent choices of a non-self-selecting class.

iii. parallel to the use of the taxing power for the regular support of churches which was the historical motivation for the Establishment Clause.

iv. hint that granting Witter's request will make religion "relevant to one's standing in the political community."

6. The Free Exercise Clause is applicable to a wide variety of cases. It has been held to require government to allow religious individuals to participate in

social welfare programs where only their religious beliefs stand in the way of eligibility. The Clause, whether or not requiring the state to pay Witters' tuition, does create "room in the joints" for such payment.

7. Given the weakness of the Establishment Clause claim in this case, the Free Exercise Clause pulls this case over the line. There is, however, no need for the Court to now determine whether the Free Exercise Clause mandates that Witters be allowed to participate in the vocational rehabilitation program, for constitutional questions should not be decided absent strict necessity to do so.

Argument

The sometimes conflicting demands of the Establishment and Free Exercise Clauses, particularly as applied to the varied activities of the modern state, have forced this court to struggle:

to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

Walz v. Tax Comm'n, supra, 397 U.S. 664, 668 (1970). See also Thomas v. Review Board, 450 U.S. 707, 720-22 (1981) (Rehnquist, J., dissenting).

This neutral course requires that neither clause may be sacrificed entirely in favor of the other. Each must be understood and applied with reference to the other, always with an eye towards achieving the ultimate goal of the clauses viewed as a whole: the protection of religious liberty in a pluralistic society, School District of Abington Twshp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

Such religious liberty, as understood in both federal and state constitutional law, mandates that religion be a voluntary

enterprise, without government sanction or support, Larkin v. Grendel's Den, 459 U.S. 116 (1982); Engel v. Vitale, 370 U.S. 421 (1962); Everson v. Bd. of Educ., 330 U.S. 1 (1947). This means stringent restrictions on governmental assistance to religious institutions. See, e.g., Mueller v. Allen, 103 S.Ct. 3062 (1983); Flast v. Cohen, 392 U.S. 83 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).*

The decisions of this Court, see, e.g., Wolman v. Walter, 433 U.S. 229 (1977), PEARL v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971) reflect this understanding.

The prohibition on financial aid to religious institutions is not merely

* All but a few state constitutions mirror this understanding, and embody rigorous and explicit restrictions on aid to religious education. See C. J. Antieau, P. M. Marks, & T. C. Burke, Religion under the State Constitutions 23 (1965).

"technical," or ancillary to other, more significant, purposes of the religion clauses. It is, rather, at the very core of that Amendment. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support and active involvement of the sovereign in religious activity," Walz v. Tax Comm'n, supra, 397 U.S. at 668.

Government assistance not only unfairly compels persons to support churches not of their own choosing, Everson v. Bd. of Educ., supra, 330 U.S. at 12-13, but also poses significant risks to the independence and autonomy of religious institutions, Lynch v. Donnelly, 104 S.Ct. 1355, 1366 (1984) (O'Connor, J., concurring); Lemon v. Kurtzman, supra, 403 U.S. at 620, the political and religious neutrality of government, Engel v. Vitale, supra, and threatens to make religion relevant to one's

standing in the political community, Lynch v. Donnelly, supra, 104 S.Ct. at 1366 (O'Connor, J., concurring).

Just as the Establishment Clause protects against governmental support for religion, so the Free Exercise Clause protects against unnecessary government interference with religion. Particularly with the growth of the welfare and regulatory state, religious liberty, as guaranteed by the Free Exercise Clause, has come to mean more than the right to hold and teach beliefs at variance with those of the majority, cf. Reynolds v. U.S., 98 U.S. 145 (1878).

It guarantees, for example, that individuals will not be penalized by government for putting those beliefs into practice, Thomas v. Rev. Bd., supra, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963), even if, as in Thomas and Sherbert, the

result is what might arguably be termed an indirect subsidy of religion.

In view of these now well settled principles in cases such as this, both free exercise and non-establishment values are implicated. The single-minded application of either one leads to diametrically opposite conclusions wholly at variance with the constitutional policy of not showing "partiality to any one group" and of allowing religious groups to "flourish according to the zeal of its adherents and the appeal of its dogma," Zorach v. Clauson, 343 U.S. 306, 313 (1952).

One could, of course, simply label this an Establishment or Free Exercise Clause case, and decide it accordingly. Such an approach is both simple minded and sterile. It fails to acknowledge the existence of the sometimes competitive nature of the values which safeguard religious liberty.

The courts must therefore determine which of the two religion clauses is more strongly implicated here -- a process which in our view calls for a balancing approach sensitive to each clause.

On the narrow facts of this case, that balance tips in favor of a finding that the Establishment Clause would not be violated if Witters' application were granted. Since the only basis for denying Witters' application was the federal Constitution's Establishment Clause, this conclusion is sufficient to dispose of this case at this time.

I. This Case Solidly Implicates Establishment Clause Values

The history of the Establishment Clause begins with challenges to the authority of government to utilize its taxing power to raise funds for the support of religious institutions, PEARL v. Nyquist, supra; Lemon v. Kurtzman, supra. "[A state] cannot consistently with the 'establishment

of religion' clause of the First Amendment contribute tax raised funds to the support of an institution which teaches the tenets and faith of any church." Everson v. Bd. of Educ., supra, 330 U.S. at 16.

Inland Empire School of the Bible, which Witters attended as a candidate for ordination, and for which he sought funds under the Washington statute, is no doubt such an institution. Petitioner himself describes it as "a private religious institution." [Petition for Certiorari at 6].

Aid to a "pervasively sectarian institution" such as Inland Empire is ordinarily impermissible, Mueller v. Allen, supra, 103 S.Ct. at 3069; Hunt v. McNair, 413 U.S. 734, 743 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); particularly where it takes the form of an undifferentiated grant to the institution which can be used at the institution's discretion.

Viewed solely in terms of the institution's budget, there is little to distinguish general operating subsidies, paid directly to the institution, and the state's agreement to pay the tuition of one or many students. Under the principles discussed above, the judgment of the Supreme Court of Washington is therefore understandable. There can be no question that the governmental expenditures that Witters seeks, and the state resists, solidly implicate traditional Establishment Clause concerns.

II. In the Circumstances of This Case, The Payments Witters Seeks Do Not Establish Religion

A. Washington's Vocational Rehabilitation Statute and Its Application to This Case Lack a Religious Purpose

This case, however, should not be disposed of so mechanically. Several significant factors mitigate the constitutional significance of government payments to the Inland Empire School of the Bible. We analyze these in light of the

three part test first laid down in Lemon v. Kurtzman, supra, and restated most recently in Tony and Susan Alamo Foundation v. Secretary of Labor, 105 S.Ct. 1953, 1964 n.30, (1985).

These tests should not be applied here in the abstract, but must be judged in light of overall societal conditions, Lynch v. Donnelly, supra.

The Washington state legislature and its Department of Services for the Blind have only the remotest and most indirect connection with the fact that Witters would be paying his seminary tuition with state funds. Washington's program was not created with the purpose of aiding religion. The vocational rehabilitation program embodied in Wash. Rev. Code § 74.16.181 (1985) cannot plausibly be treated as if it were intended to subsidize religion, or, as if it were even reasonably foreseeable that it would do so. Its secular purpose is self-evident and

beyond challenge -- aiding those blind persons with the potential to be self-sufficient.

This rehabilitative goal is a valid secular purpose. And because rehabilitation cannot take place without the assistance of the person to be rehabilitated, the state must enlist his support to achieve its end. Of necessity, this requires that the state defer to all reasonable career goals. Thus, this is not a case where a more secular means is available to carry out the state's secular purposes, Lynch v. Donnelly, supra, 104 S.Ct. at 1372 n.4 (Brennan, J., dissenting).

This is also not a case, such as that hypothesized by the Chief Justice, dissenting in part in PEARL v. Nyquist, supra, 413 U.S. at 801-02, where an ostensibly secular statute is merely a subterfuge for funding churches or religious education. It is not even a case like Mueller v. Allen, supra.

There, statistical evidence suggested not only that the legislative purpose of a tuition tax deduction was to encourage parochial school attendance, but that the overwhelming bulk of the benefits of the deduction flowed directly or indirectly to religious institutions. Nevertheless, this Court held -- AJCongress thinks incorrectly -- that these factors were irrelevant to constitutional analysis.

No more persuasive on this record is the argument that a decision by the Department to grant Witters' application has such a religious purpose. As far as appears, it matters not at all to the Department whether Witters receives vocational training in law, theology or baking. Of course, if there were proof that the Department routinely urged the visually handicapped to use their benefits to attend seminaries, a different, and far easier, case would be presented. This, however, does not appear to be that case.

B. The Challenged Statute, Either on its Face or as Applied, Does Not Have the Effect of Advancing Religion

When viewed from Witters' perspective, granting his application has the effect of advancing religion. Absent these funds, Witters may be unable to attend school. Granting him these tax-raised funds thus enables him to obtain a religious education, a state of affairs ordinarily proscribed by the Constitution.*

* This effect cannot, and should not, be ignored by the Court. If the fact that religion is benefitted becomes irrelevant as a matter of law -- as broad and unfortunate dicta in both Lynch v. Donnelly, supra, 104 S.Ct. at 1363, and Mueller v. Allen, supra, 103 S.Ct. at 3069-70 suggest -- then almost any statute which does not explicitly call for aid to pervasively religious institutions will pass constitutional muster, no matter how it in fact operates. That would be a departure from this Court's settled rule that the Constitution "nullifies sophisticated as well as simple-minded" schemes to circumvent its guarantees, cf. Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960), citing, Lane v. Wilson, 307 U.S. 268, 275 (1939); Meek v. Pittenger, supra, 421 U.S. at 374-75 (Brennan, J., concurring in part, and dissenting in part). It would also undermine a direct holding in the parochial school aid context that a statute constitutional on its face may violate the Establishment Clause as applied, Wheeler v. Barrera, 417 U.S. 402 (1974).

Religious education is an integral part of the mission of every church and is for Establishment Clause purposes no less religious than prayer or Bible reading, as this Court has repeatedly held, e.g., PEARL v. Nyquist, supra; Lemon v. Kurtzman, supra, Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

However, this Court's decisions make clear that not every incidental benefit to religion is sufficient to amount to a constitutional violation, PEARL v. Nyquist, supra, at 783, n.39. If an unconstitutional "effect" were to be equated with the simple and unvarnished fact that a government action facilitates religious practice or observance, then, as Justice Rehnquist argued in Thomas v. Rev. Bd, supra, 450 U.S. at 720-22, all accommodation of religion would be unconstitutional.

Just as not every accommodation purportedly made under the Free Exercise Clause can escape condemnation as an

establishment by talismanic invocation of the Free Exercise Clause, Wisconsin v. Yoder, supra, 406 U.S. at 220-21, so, too, not every practice which in fact aids religion is unconstitutional, Zorach v. Clauson, 343 U.S. 306 (1952). Some simply have too remote an impact on both religion and society to rise to the level of an establishment.

This Court's decisions embody objective criteria for judging whether the effect of a particular statute or practice has the direct and immediate effect of advancing religion. Under these standards, enabling Witters to pursue the career of his choice would have only on a de minimis impact on religion and society.

First and foremost among this Court's criteria is the availability of the benefit for a wide variety of vocational and educational purposes. This Court has twice noted in its recent cases that the

"provision of benefits to so broad a spectrum of groups is an important index of secular effect," Widmar v. Vincent, 454 U.S. 263, 274 (1981); Mueller v. Allen, supra, 103 S.Ct. at 3068, if only because a statute which submerges religion into a larger group of beneficiaries sends an entirely different message about religion's role in society than one that singles out religion explicitly for special treatment.

The Washington vocational rehabilitation statute under which Witters seeks assistance provides that persons eligible for assistance under the statute may use the funds for a wide variety of vocational or educational programs. Religion is aided only as and if individuals seek to use it for religious training. As far as appears on the record, Witters is the only person in Washington to have ever

sought to do so;* it cannot therefore be said that the benefits to religion as a social institution are anything but "remote" and "incidental" Mueller v. Allen, supra, 103 S.Ct. at 3069.

Further, here, the state has no interest in, and has apparently not urged, the blind to use their benefits for religious education. Religion as a whole is not advanced under this program. The state has merely agreed to provide the blind, who would otherwise be at risk of becoming charges on society, the means to become self-sufficient. That in this case funds go to a seminary is no more chargeable to the state than if a church were the winner of a state-run lottery.

This Court has invoked the principle that religion is not impermissibly advanced

* Cf. Widmar v. Vincent, supra, 454 U.S. at 275 (noting absence of proof that religious speakers would dominate limited public forum).

when benefits go to a broad spectrum of groups (and pursuant to individual choices) in upholding state student loan schemes under which those attending even pervasively sectarian institutions are eligible for loans, Americans United v. Blanton, 433 F. Supp. 97 (M.D. Tenn.), aff'd, 434 U.S. 803 (1977); Durham v. McLeod, 192 So.2d 202 (S.C. 1972), aff'd, 413 U.S. 902 (1973). These results were explained in PEARL v. Nyquist, supra, 413 U.S. at 782, n.38:

[we] need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See Wolman v. Essex, 342 F. Supp. 399, 412-413 (S.D. Ohio), aff'd, 409 U.S. 808 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 U.S.C. § 1651, impermissibly advance religion in violation of the Establishment

Clause. See also n. 32, supra.*

Those decisions are controlling here.

The effect of advancing religion is further diluted because the aid is "available only as a result of numerous private random choices," Mueller v. Allen, supra, 103 S.Ct. at 3069.**

These principles are not just post hoc rationalizations of a pre-ordained result. Rather, properly applied, they can assist a court in determining whether a particular practice poses the dangers the Establishment Clause was designed to forestall. Those dangers as applied to this case are four-fold:

* However, Americans United v. Bubb, 379 F. Supp. 872 (D. Kan. 1974) and D'Errico v. Lesmeister, 570 F. Supp. 158 (D.N.D. 1983), held that students at pervasively sectarian colleges could not participate in student loan programs in view of the Establishment Clause.

** To be sure, it is not alone determinative, PEARL v. Nyquist, supra, 413 U.S. at 782, n.38.

1) Non-coercion, so that persons not be pressured into participation in religious practices by government. Witters was not coerced into using his vocational funds for theological training. This is clearly not a coercion case. Marsh v. Chambers, 103 S.Ct. 3330, 3335 (1983).

2) Structural separation, so that religion and government not become too dependent on one another. Where the state designs a program intended to subsidize religious institutions, there is a substantial risk that that institution will become addicted to government funding for continued financial support. A symbiotic relationship inhospitable to religious liberty and governmental neutrality is the likely result, Larkin v. Grendel's Den, supra. * For the reasons stated above, this

* The likelihood of dependence on government is here further reduced by the fact that only a limited class of persons -- who have almost no control over their own eligibility, and no independent incentive to become eligible -- is eligible for the aid.

is not a case where this is a likely possibility.

This is not a case -- as Mueller v. Allen was -- where the foreseeable impact of a statute or practice is to provide sums that in absolute terms are sufficiently significant as to induce dependence on government, and to make it likely that government will in effect gain control, cf. Wolman v. Walter, 433 U.S. 229, 256 (1977) (Brennan, J., concurring and dissenting) (sheer size of aid to parochial schools makes such aid programs suspect). Nor is it a program which provides funds on such a regular periodic basis that the religious institution can come to rely on such funds in budgeting.

3) The unfairness of using the taxing power to support religion, for it is unjust to use government's taxing power to compel a person to support a religious faith other than his own. Allowing the state to

pay the costs of Witters' theological training in one sense does just that.

Madison's Remonstrance, perhaps the most eloquent expression of opposition to such taxes, was written to counter a tax levied for the support of ministers of the gospel, Everson v. Bd. of Educ., supra. There is, therefore, a close parallel between the taxes Madison objected to in the Remonstrance and aid to parochial school schemes. For this reason, the Court has properly invalidated most such legislation.

There is, however, simply no parallel between such a use of tax funds and paying for Witters' vocational rehabilitation even though it entails paying for advanced theology training.

4) A breach of governmental neutrality, in Justice O'Connor's phrase, makes "adherence to a religion relevant in any way to a person's standing in the political community," or would "foster the

creation of political constituencies defined along religious lines," Lynch v. Donnelly, supra, 104 S.Ct. at 1366; Larkin v. Grendel's Den, supra.

That fear is particularly relevant where government sponsors a religious exercise, as in the case of school prayer or religious symbols, or, perhaps, delivers social services exclusively through sectarian social service agencies. It has no relevance here.

Neither Witters or anyone else gains or loses social standing by allowing the state to pay his tuition at Inland Empire. Nor would such a decision create any realistic likelihood that political constituencies will divide along religious lines. Allowing Witters to participate would not require other blind citizens to identify with some religion in order to participate in a government funded program.

In sum, while the payment of tuition to a theological seminary does have the effect of advancing religion, the impact of that payment is greatly attenuated in this case. Still, were this case to be evaluated solely in terms of the Establishment Clause, it would be a close case, perhaps tilting in favor of an affirmance.*

* The final branch of the tripartite test for determining whether a practice violates the Establishment Clause is whether the statute or practice unduly entangles government with religion.

There is nothing in this record arguably to suggest that the grant Witters seeks in fact did create any political controversy.

Because the funds for Witters' grant come from a lump sum appropriation to the State Department of Services for the Blind, there is no likelihood that the legislature will annually become embroiled in a dispute over particular uses of these funds, Mueller v. Allen, supra, 103 S.Ct. at 3071, n.11.

Moreover, there is nothing in either the statute or the record which would indicate any greater need for supervision than in the case of college student loan programs, which, as noted, have been upheld by this Court.

III. Free Exercise

Had the Founding Fathers determined to protect religious liberty only by including a prohibition on religious establishments in the Bill of Rights, this would be a difficult and close case, notwithstanding the existence of factors which tend to mitigate the "establishing" effect. The political concerns which gave rise to the First Amendment were not so limited.

The Founders apparently recognized that non-establishment could not alone guarantee religious liberty. Taken as the sole guarantor of religious liberty it would "partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious," School Dist. of Abington Twshp. v. Schempp, supra, 374 U.S. at 306 (Goldberg, J., concurring).

Government cannot interfere with religious liberty by outlawing a particular belief or by punishing persons merely for holding or expressing those beliefs. Such actions are absolutely foreclosed by the Free Exercise Clause, Sherbert v. Verner, supra, 374 U.S. at 402; W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

Religious liberty is also denied when government compels persons to act in violation of their religious values, Wisconsin v. Yoder, 406 U.S. 205 (1972). Religious liberty is also denied, under this Court's cases, if government denies participation in its social welfare programs to otherwise eligible persons who are unable to participate because of their religious practices, Thomas v. Rev. Bd., supra; Sherbert v. Verner, supra, notwithstanding the fact that government does not directly regulate religious practice as such.

The constitutional values represented by these different strands of free exercise doctrine reflect an attitude of hospitality towards religion. They embody society's recognition that it ought not -- indeed cannot properly -- interfere with deeply held beliefs, absent the most compelling justification. See Gianella, Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee, 80 Harv. L. Rev. 1381, 1411-14 (1967). The Free Exercise Clause is the constitutional policy which more than any other recognizes the worth of the individual and the sacredness of individual conscience, of the right to march to one's own drummer, to make judgments about ultimate values.

Religious commitments vary in intensity. How a person chooses to manifest his religious faith is protected from government interference by the Free Exercise Clause. It is not the role of government to

evaluate or regulate the validity or extent of one's religious commitment, Thomas v. Rev. Bd., supra, 450 U.S. at 715-16.

McDaniel v. Paty, 435 U.S. 618

(1978), recognizes that the call to act as a minister is protected from unjustified state interference by the Free Exercise Clause.

Tennessee ... acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention.... Yet under the clergy disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other.... In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." Sherbert v. Verner, 374 U.S. 398, 406 (1963).

435 U.S. at 626.

The parallels between this case and McDaniel (as well as to Sherbert and Thomas)

are obvious. The Free Exercise Clause was implicated in those cases because the First Amendment "does not require the state to be [the] adversary [of religion]. State power is no more to be used so as to handicap religions, than it is to favor them," Everson v. Bd. of Educ., supra, 330 U.S. at 18.

When "individual Catholics ... or the members of any other faith, because of their faith, or lack of it, ... [are denied receipt of] the benefits of public welfare legislation," Thomas v. Rev. Bd., supra, 450 U.S. at 716, quoting, Everson v. Bd. of Educ., supra, 330 U.S. at 16 (1947) (emphasis deleted), the Free Exercise Clause is implicated.

The denial of vocational rehabilitation benefits to Witters, based solely on the fact that he has chosen to attend theological seminary, touches upon the values protected by the Free Exercise Clause

just as surely as did Tennessee's restriction on public office holding by ministers.

Without regard to whether the Free Exercise Clause is sufficient of its own force to require a state to make vocational training funds available for eligible persons seeking to pursue a religious career,* it is sufficient to counterbalance

* This Court has repeatedly rejected free exercise claims that the state must fund otherwise eligible religious institutions if there is no constitutional bar to such funding under the Establishment Clause, Bob Jones University v. U. S., 103 S.Ct. 2017 (1983); Norwood v. Harrison, 413 U.S. 455 (1973); Lutkemeyer v. Kaufmann, 364 F. Supp. 376 (Mo.), aff'd, 419 U.S. 888 (1974); Everson v. Bd. of Educ., supra.

Whether this case is closer to cases such as Thomas v. Rev. Bd., supra, or Sherbert v. Verner, supra, is a difficult question. Indeed in Everson v. Bd. of Educ., supra, the Court's opinion contains language both suggesting that the state cannot deny funds to a religious institution simply because it is such, 330 U.S. at 16, and other language suggesting that it has discretion not to fund such institution, Id. The Court need not resolve this issue in this case for reasons we explain below.

the relatively minimal "establishment" which results when a state does so. As noted above, this is at best a weak Establishment Clause case on the merits. Whatever little strength there was in the establishment argument is more than outweighed by the free exercise value to be vindicated by not obstructing Witters' efforts to become ordained.

The balancing approach urged here is not appropriate for every case. In some cases, a challenged practice is clearly contrary to the purposes of one or the other clauses. Thus, the prohibition on direct, unrestricted aid to churches or parochial schools is so central to the Establishment Clause as to call for no inquiry under the Free Exercise Clause, much less any balancing process.

Requiring states to allow Sabbath observers to participate in unemployment insurance programs even if they turn down

work on their Sabbath, or excusing the Amish from some portion of the compulsory education laws, pose no threat whatsoever to Establishment Clause values. There, too, no balancing is called for.

On the other hand, in McDaniel v. Paty, supra, where Tennessee defended a provision excluding clergymen from public office on the ground that the exclusion was necessary to preserve the separation of church and state, this Court, after finding that this prohibition violated the Free Exercise rights of clergymen, turned to Tennessee's Establishment Clause argument.

It rejected Tennessee's argument not because it found that the Establishment Clause was not a defense to a free exercise claim, but because there was simply no adequate factual basis for the Establishment Clause claim:

Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political

process have not lost whatever validity they may once have enjoyed. The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. ... [T]he American experience provides no persuasive support for [that] fear....
(citations and footnote omitted)

435 U.S. at 628-29.

Had there been a factual predicate for the state's claim, the Court would have been forced to engage in a balancing process.

A similar process was undertaken by this Court in Widmar v. Vincent, supra, where the Free Speech and Establishment Clauses came into conflict. The Court there determined that college students' free speech rights had been violated by a rule barring student religious clubs from using empty classrooms for its meetings, a right conferred on other student groups. It then

assessed the significance of the university's claim that allowing the clubs to meet would place it in the position of establishing religion. Again, this Court found that the Establishment Clause arguments were not sufficiently strong on the record before it to justify the denial of free speech. Following a similar analysis, but on a different factual record, the Third Circuit reached an opposite result in the high school setting, Bender v. Williamsport Area School District, 741 F.2d 538 (3d Cir. 1984), cert. granted, 53 U.S.L.W. 3585 (1985).

The balancing method of analysis is consistent with this Court's description of its First Amendment decisions, under which "short of [governmentally established religion or governmental interference with religion] there is room for play in the joints...." Walz v. Tax Comm'n, supra, 397 U.S. at 669. Even more to the point is

Professor Wilber Katz' statement that the First Amendment insures "a secular state -- but a secular state which does not give preference to secularism and is actively concerned for religious freedom," W. G. Katz, Religion and American Constitutions 22 (1964).

The balance in this case tips decidedly in favor of Witters. This is a marginal claim under the Establishment Clause. Although the Free Exercise Clause may not mandate that Witters be declared eligible for participation in such programs, it surely implies that "the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints .. [for] cautiously delineated secular ... assistance...." Norwood v. Harrison, supra, 413 U.S. at 469. This is a case in which that value should at least allow the state the option of paying for Witters' vocational training as a minister.

IV. The Free Exercise Issue
Need Not Be Reached

The Washington Supreme Court held that the Establishment Clause was a bar to Witters' participation in the state's vocational rehabilitation program. That judgment, as we have shown, is erroneous. Should this Court agree, Witters' application will be granted unless and until the state constitution is held to bar it.

Only if the Washington courts so hold will there be any need for this Court to reach the federal Free Exercise Clause issue raised by petitioner. In view of the rule confining constitutional decisions to cases of "strict necessity," this Court should not now pass on this issue, Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947).*

* Accord, Minnick v. California Dep't. of Corrections, 452 U.S. 105 (1981); NYCTA v. Beazer, 440 U.S. 568 (1979); F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971); Sacks v. Ga., 401 U.S. 144 (1971); W. E. B. Dubois Clubs of America v. Clark, 389 U.S. 309 (1967).

Conclusion

The judgment should be reversed and remanded to the state court for further proceedings.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON,
COMMISSION FOR THE BLIND,

Respondent.

On Writ Of Certiorari To The Supreme Court of
The State of Washington

**BRIEF FOR AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE
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OCTOBER TERM, 1984

No. 84-1070

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent,

**BRIEF FOR AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE
AS AMICUS CURIAE**

For the reasons herein stated, Americans United for Separation of Church and State, *amicus curiae*, respectfully submits that the decision by the Supreme Court of Washington State should be affirmed.

INTEREST OF THE AMICUS CURIAE

Since 1947, Americans United for Separation of Church and State (Americans United) has worked to preserve the constitutional principle of church-state separation, a vital cornerstone of religious liberty. Americans of many faiths and political viewpoints, and from all walks of life have come together in this organization to protect these liberties.

Americans United, with more than 50,000 members of various religious beliefs, and some of no belief, stands as a recognized organization working to preserve this Nation's heritage of religious freedom. From its offices in Washington, D.C., and California, and a network of members and volunteers in all 50 states, it is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United has been involved in almost every major case before this Court dealing with the Establishment Clause of the U.S. Constitution. It is particularly concerned with apparent efforts to dilute Establishment Clause protections through a misplaced reliance on the Constitution's Equal Protection Clause.

Amicus curiae has secured the written consent of both the Petitioner and Respondent to the filing of the brief herein.

ARGUMENT

The Supreme Court of Washington determined that providing state financial vocational assistance to a blind person studying to be "a pastor, missionary or church youth director" at the Inland Empire School of the Bible violated the Establishment Clause of the First Amendment to the U.S. Constitution.¹ In doing so, that Court

¹ It is likely that the State Supreme Court would have reached essentially the same decision if it had relied upon the "religion clauses" of the Washington State Constitution at Article 1, Section 11, and Article 9, Section 4. The state Court observed: "Since our State Constitution requires a far stricter separation of church and state than the federal Constitution . . . it is unnecessary to address the constitutionality of the aid under our State Constitution." 689 P.2d 53 at 55 (1984). Ironically, if the state Court should consider this matter once again, a similar result as is now before this Court could be expected under state law.

properly relied upon and applied the criteria articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). It also followed the counsel of *Hunt v. McNair*, 413 U.S. 734 (1973), when it concluded that: "The provision of financial assistance by the State to enable someone to become a pastor, missionary or church youth director clearly has the primary effect of advancing religion." 689 P.2d 53 at 56.

Of particular concern, however, to Americans United is the contention inherent in the Petitioner's argument that a state—under the Equal Protection Clause of the U.S. Constitution—can be compelled to prepare a person for a religious ministry and thus to violate if not the Federal Constitution then its own.

This issue was considered in *Lutkemeyer v. Kaufmann*, 364 F.Supp. 376 (WD Mo. 1973), *Aff'd*, 419 U.S. 888 (1974). There the state of Missouri provided bus transportation to public school children but refused to do so for certain private school children. A taxpayer who sent his children—in accordance with his religious conscience—to a school operated by the Roman Catholic Church challenged the state's refusal. He argued that in denying bus transportation to parochial school children the state had violated the Equal Protection Clause of the U.S. Constitution.

The District Court, relying upon that state's constitution, determined to be stricter than the Establishment Clause of the U.S. Constitution, rejected the taxpayers equal protection argument. The Court concluded that the Missouri program of excluding private school children from the transportation service was in pursuit of a valid state interest in "maintaining a very high wall between church and state." 364 F.Supp. 376 at 383. In so doing, the Court rejected the parents' Equal Protection Clause

argument. The U.S. Supreme Court affirmed this decision at 419 U.S. 888 (1974).²

In similar fashion, the state of Washington's denial of educational benefits—whether premised upon the Establishment Clause of the U.S. Constitution or of the State's own Constitution—should not be construed as a violation of the equal protection rights of the U.S. Constitution.

A comparable Equal Protection Clause argument was made to the Court in *Norwood v. Harrison*, 413 U.S. 455 (1973). In that case, the state of Mississippi purchased textbooks and lent them to students in both public and private schools without reference to whether any participating private school had racially discriminatory policies. This Court concluded that while private schools have a right to exist and operate, the state is not required by the Equal Protection Clause to provide assistance to private schools equivalent to that it provides to public schools.

In rejecting the equal protection argument, Chief Justice Burger observed:

Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or

² Such an affirmance is a decision on the merits entitled to precedential weight. See *Edelman v. Jordan*, 415 U.S. 651 (670-671); *c.f. Cincinnati N.O. & T.P.R. Co. v. United States*, 400 U.S. 932, 935 (1970).

textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance." See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

In the same way, the State of Washington can effect its own constitutional objective and maintain a desired neutrality under the Establishment Clause by refusing to educate a person to become "a pastor, missionary or church youth director" at the Inland Empire School of the Bible. To pursue such a policy would not violate the Equal Protection Clause. While a state may not prohibit a school from training a clergyman, nor a person be prevented from pursuing such a profession, it does not follow that such schools must—as a matter of right—receive state aid to educate clergymen.

As the Court observed in *Sloan v. Lemon*, 413 U.S. 825 at 834-35 (1973): "The Equal Protection Clause has never been regarded as a bludgeon with which to compel a state to violate other provisions of the Constitution."

CONCLUSION

The State of Washington, relying upon the Establishment Clause of the First Amendment, has refused to fund the Petitioner's pursuit of a career as "a pastor, missionary or church youth director."

The decision of the Supreme Court of Washington should be affirmed on the Establishment Clause rationale. Additionally, this Court must not permit itself to be placed in the position of ordering a state to provide—directly or indirectly—benefits for the advancement of religion. Such a consequence is impermissible and could have disastrous results. The Equal Protection Clause does not provide Petitioner a remedy.

For these reasons, Americans United requests this Court to affirm the decision of the Supreme Court of Washington.

Respectfully submitted,
LEE BOOTHBY

No. 84-1070

Supreme Court, U.S.
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B'NAI B'RITH ON BEHALF OF ITSELF AND AMERI-
CANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN
SUPPORT OF RESPONDENT**

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QUESTIONS PRESENTED

1. Whether the provision of aid by a state agency directly to a pervasively sectarian institution for the sectarian purpose of subsidizing a student's training as a pastor, missionary or church youth director violates the first amendment's establishment clause.

2. Whether a student has a free exercise right to have the state pay for his ministerial training when there is no burden on his right to practice his religion.

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CANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN
SUPPORT OF RESPONDENT**

This brief is submitted with the consent of the parties.

Originals of the letters reflecting such consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

INTEREST OF THE AMICI CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs in such cases as *Grand Rapids v. Ball*, 53 U.S.L.W. 5006 (U.S. July 1, 1985); *Aguilar v. Felton*, 53 U.S.L.W. 5013 (U.S. July 1, 1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Abington v. Schempp*, 374 U.S. 203 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support for religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty is a non-profit, nationwide educational organization with members representing the entire religious spectrum. Americans for Religious Liberty is dedicated to defending religious liberty for all persons, and maintains that the defense of religious liberty requires as strict as possible adherence to the constitutional principle of separation of church and state.

STATEMENT OF THE CASE

The petitioner in this case, Larry Witters, is a 28-year-old student with a degenerative eye disease who requested a government educational subsidy from the State of Washington Department of Services for the Blind. The requested subsidy was in connection with his application to the Inland Empire School of the Bible, a pervasively sectarian institution which trains its students to be pastors, missionaries and church youth directors.

The Department of Services for the Blind (formerly the "Commission for the Blind") is empowered to prepare, adopt and certify state plans, rules and regulations for the blind and visually handicapped. It is specifically authorized to "provide for special education and/or training in the professions, businesses or trades," Wash. Rev. Code Ann. § 74.16.181 (1982), and it does so by funding the education and training of qualified applicants. According to the Office of the Attorney General of the State of

Washington, the Department's policy "has always been to pay the school or training facility directly . . . to make sure that the individual does not take the money and spend it on something else." See Letter of David R. Minikel, Assistant Attorney General, attached as an Appendix. Mr. Minikel's letter emphasizes that "Washington State's practice is to provide the money directly to the institution involved and not to the individual." *Id.*

The Commission for the Blind rejected Witters' request for a subsidy in March 1980, concluding that the Constitution of the State of Washington forbids the use of public funds to assist an individual in ministry career training. Article 1, Section 11 of the Washington Constitution provides that "no public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment." In October 1980, following an administrative hearing, the Commission's decision was upheld by the Washington Department of Social and Health Services. Witters then appealed to the Superior Court in Spokane, and in an unreported opinion, Judge Marcus M. Kelly affirmed the Commission's decision in May 1982, again relying on the Washington Constitution. The case was then appealed to the Washington Supreme Court.

In its 7-2 decision issued last October, the Washington Supreme Court affirmed Judge Kelly's denial of the government funds to Witters. The Washington Supreme Court majority evaluated the program's constitutionality under the first amendment to the United States Constitution, and concluded that the primary effect of the aid in question would be to advance religion. The Washington Court therefore indicated that it did not have to consider the stricter provisions of the state constitution, and prohibited the transfer of state funds to the Inland Empire School of the Bible on Larry Witters' behalf. According to the Washington Supreme Court, "it is not the role of the state to pay for the religious education of future ministers." *Witters v. State of Washington*, 102 Wash.2d 624, ___, 689 P.2d 53, 56 (Wash. 1984).

SUMMARY OF ARGUMENT

This case raises the question of whether a state can provide financial assistance directly to a sectarian institution for the purpose of educating a future pastor, missionary or church youth director. Such direct aid to a sectarian institution for a sectarian purpose has never previously been allowed by this Court, because the establishment clause of the first amendment to the United States Constitution forbids it.

This Court recently emphasized that "although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the belief of a particular religious faith." *Grand Rapids v. Ball*, 53 U.S.L.W. 5006, 5009 (U.S. July 1, 1985). *Amici* submit when this principle is applied to the instant case, it mandates a finding that the State of Washington correctly refrained from subsidizing Larry Witters' religious education.

The first amendment's establishment clause "primarily proscribes 'sponsorship, financial support and active involvement of the sovereign in religious activity.'" *Grand Rapids*, 53 U.S.L.W. at 5008, citing *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973). In determining whether a statute violates the establishment clause, the Court has traditionally considered its purpose, its effect, and whether it fosters an excessive government entanglement with religion. *Grand Rapids*, 53 U.S.L.W. at 5008, citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Although the program at issue in this case might have a secular purpose and not foster excessive entanglement,¹ state aid directed to the Inland Empire School of the Bible on Larry Witters' behalf would have the unconstitutional primary effect of advancing religion. Unlike other cases in which this

1. If petitioner were to contend that the aid was serving a non-secular educational function of the sectarian institution, there would be an entanglement issue, because extensive government monitoring would be necessary to ensure the aid's correct use. See, e.g., *Aguilar v. Felton*, 53 U.S.L.W. 5013 (U.S. July 1, 1985). There is no entanglement issue here only because petitioner in effect concedes that the aid serves a sectarian educational function. See *infra* section IB.

Court has permitted some form of aid to religious institutions for their secular activities, this case involves aid to an institution which is pervasively sectarian for sectarian purposes. Consequently, it crosses the line of permissible assistance established by this Court.

Amici submit that state aid to the Inland Empire School of the Bible on Larry Witters' behalf should also be denied because it would pose an unconstitutional endorsement of Witters' religion. Anyone who becomes a pastor, missionary or church youth director at government expense conveys the message that the government has endorsed or preferred his religion. The establishment clause was intended to prevent just such endorsements. See generally *Wallace v. Jaffree*, 53 U.S.L.W. 4665, 4674 (U.S. June 4, 1985) (O'Connor, J., concurring).

In stating his case, petitioner has raised a free exercise claim, but his argument is not persuasive. The State of Washington's refusal to subsidize Larry Witters' education has not compelled or coerced him to violate his religious beliefs, and he is not being denied the opportunity to pursue his career goal. No American, Larry Witters included, has a free exercise right to government-funded training for the ministry. See generally *id.* at 4677.

Larry Witters' campaign for government-subsidized religious training has failed at every level, from the Washington Department of Services for the Blind through the Washington Supreme Court. It has failed because he is not entitled to the aid he seeks under either state or federal law. *Amici* therefore urge this Court to affirm the decision of the Washington Supreme Court, a decision mandated by the first amendment.

ARGUMENT

I.

THE WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND CORRECTLY REFUSED TO FORWARD FUNDS TO THE INLAND EMPIRE SCHOOL OF THE BIBLE TO SUBSIDIZE LARRY WITTERS' RELIGIOUS TRAINING BECAUSE SUCH AID IS PROHIBITED BY THE ESTABLISHMENT CLAUSE

A. The First Amendment Requires States to Treat Sectarian Institutions Differently from All Others.

The first amendment to the United States Constitution recognizes "the place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind." *Wallace v. Jaffree*, 53 U.S.L.W. at 4669 n.37, citing *Abington v. Schempp*, 374 U.S. 203, 226 (1963). Through "the crucible of litigation," *id.* at 4669, this Court has recognized that "it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard." *Id.*

To invade the citadel would be to collide with our historic commitment to treat religion specially. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). As Madison declared and this Court affirmed in *Engel v. Vitale*, 370 U.S. 421 (1962), it is because religion is "too personal, too sacred, too holy." 370 U.S. at 432.

Treating religion specially means treating sectarian institutions differently from all others. Since the underlying objective of the establishment clause is "to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other," *Aguilar v. Felton*, 53 U.S.L.W. at 5016, citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), amici submit that the state cannot pay for a minister's training.

The Washington Supreme Court's decision that "it is not the role of the state to pay for the education of future ministers" protects the church from intrusion by the state. *Witters v. State of*

Washington, 689 P.2d 53, 56 (Wash. 1984). The Washington court recognized that this case does not pose the question of whether a state may properly direct aid to sectarian institutions for non-sectarian purposes, nor does it require a decision on the legality of aid generally to visually handicapped students. The specific issue in the instant case is whether a state can subsidize the training of a future pastor, missionary or church youth director by transferring taxpayers' money directly to his religious school. The purpose of this aid would be manifestly sectarian.

Once Larry Witters expressed a religious vocational preference, the first amendment, as applied to the states by the fourteenth amendment, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940), requires the state to treat his situation differently from all others. As the framers wisely saw and this Court has consistently recognized, government aid to religious institutions raises numerous problems which threaten individual religious liberty -- problems not raised by aid to secular institutions.² It is this special concern with religious liberty, see *Jaffree*, 53 U.S.L.W. at 4669, not triggered by aid to non-religion, which mandates eschewal of government aid to religious institutions.

There was no greater establishment concern for the framers than government aid for religious institutions, whether preferential or not, because they believed such aid would threaten individual religious liberty in numerous ways. They perceived danger in its potential for engendering competition among religions. See *Grand Rapids v. Ball*, 53 U.S.L.W. at 5008, citing *Committee for Public Education v. Nyquist*, 413 U.S. at 796-798; *Lemon v. Kurtzman*, 403 U.S. at 622-624. They also feared the coercion inherent in drawing upon compulsory tax payments for the support of sectarian institutions. See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 13 (1947).

2. This is glossed over by petitioner in this case and by the United States as *amicus*. While the argument that religious and non-religious institutions must be treated equally, see Brief for Petitioner at 20; Brief for the United States as *Amicus Curiae* at 15 n.6, is facially appealing, this argument fails to account for the special treatment historically accorded to religious institutions in order to protect individual religious liberty. See *Jaffree*, 53 U.S.L.W. at 4669.

The history of disestablishment in Virginia reflects the framers' opposition to a general tax to be distributed among all Christian Churches. Recognizing that the government would have to define a religious institution for purposes of government aid, the framers believed that such definitions would result in limits on religious liberty and exclude those of different or no religious beliefs. See *Grand Rapids*, 53 U.S.L.W. at 5008; *Everson v. Board of Education*, 330 U.S. 1, 13-16 (1947). Further, given that government is majoritarian, there is always the possibility that initial government support for a variety of religious establishments may later shrink to only some or one. See J. Madison, *Memorial and Remonstrance Against Religious Assessments*, Appendix to *Everson v. Board of Education*, 330 U.S. 1 (1947).

These principles were recently reinvoked by this Court in *Grand Rapids*, 53 U.S.L.W. at 5008. In rejecting government aid to institutions devoted to religious instruction, the Court reaffirmed the wisdom of the framers.³ It called for "an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Grand Rapids*, 53 U.S.L.W. at 5008, quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Beyond the potential discrimination inherent in government aid to religious institutions is a coercion resulting from requiring all citizens -- regardless of belief -- to support religious institutions and advance their religious missions. Such coerced support for a religious institution's sectarian purpose constitutes a fundamental threat to individual religious liberty.

This was recognized by the framers in the Virginia Bill for Religious Liberty, see *Everson v. Board of Education*, 330 U.S. at 13, and reaffirmed by this Court: "No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever. . . ." *Id.* Furthermore, this Court has also emphasized

3. Madison's *Memorial and Remonstrance* was a response to a proposed bill in Virginia to tax for purposes of supporting teachers of religion. This proposed assessment was rejected, and instead the Virginia legislature passed the Bill for Religious Liberty, which served as the foundation for the First Amendment. See *Everson v. Board of Education*, 330 U.S. 1, 13 (1947).

that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *McCullum v. Board of Education*, 333 U.S. 203, 210 (1948).

The compulsion implicit in the use of tax monies to support religious institutions in their religious objectives conflicts with this Court's recent assertions that at the heart of the first amendment protection is "individual freedom of conscience" which "embraces the right to select any religious faith or none at all." *Jaffree*, 53 U.S.L.W. at 4669. Moreover, this right of selection must be the "product of free and voluntary choice" if it is to be a right at all. Where compulsory taxation would provide funding of a sectarian institution, this free choice is absent.

It is this individual religious liberty which is implicated in the instant case. See *infra* section II. For the state to provide aid to a religious institution, the Inland Empire School of the Bible, in order to train its future ministers, is to threaten the religious liberty of all citizens who do not share that institution's creed. The provision of such aid diverts government from its course of "complete neutrality" toward religion. *Jaffree*, 53 U.S.L.W. at 4671.

While some forms of government aid to religious institutions do not raise the concerns at issue in the instant case because they are incidental and do not advance religious purposes,⁴ the funding at issue herein, more fully discussed *infra*, concededly subsidizes a religious institution's religious purpose.

4. Institutions may appropriately receive incidental government benefits particularly in areas where the government has a monopoly, such as fire and police protection. See *Abington v. Schempp*, 374 U.S. 203, 260 (1963) (Brennan, J., concurring).

B. State Aid Directed to the Inland Empire School of the Bible on Larry Witters' Behalf Would Have the Unconstitutional Primary Effect of Advancing Religion

For a statute to survive scrutiny under the establishment clause, this Court has held that (1) it must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion. *Jaffree*, 53 U.S.L.W. at 4670, reaffirming *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). All of the parties to this action agree that the Washington statute implicated in the case has a valid secular legislative purpose, and no party posits a significant entanglement problem. Consequently, in the instant case, the statute's constitutionality under the tripartite test depends upon this Court's determination of its primary effect.

Amici submit that the primary effect of giving state aid to the Inland Empire School of the Bible to finance Larry Witters' religious training is to advance his religion. Such aid is unconstitutional, first because the institution is pervasively sectarian and would be using the aid for a sectarian purpose, and further because the aid would be transmitted directly from the state to the sectarian institution.

1. A State Cannot Provide Aid to a Pervasively Sectarian Institution for a Sectarian Purpose

a. The Inland Empire School of the Bible, a Sectarian Institution, is an Improper Recipient of State Aid

This Court has held that there may be no government aid to advance a sectarian purpose. *See, e.g., Grand Rapids v. Ball*, 53 U.S.L.W. at 5009. Accordingly, when secular and sectarian activities are separable, the Court has approved aid only to support secular activities. *Roemer v. Board of Public Works*, 426 U.S. 736, 756 (1976); *see also Aguilar v. Felton*, 53 U.S.L.W. at 5016; *Committee for Public Education v. Nyquist*, 413 U.S. 756

(1973); *Hunt v. McNair*, 413 U.S. 663 (1973).⁵ No government aid may be given to institutions so pervasively sectarian that secular activities cannot be separated from sectarian ones. *Roemer*, 426 U.S. at 756; *see also Hunt v. McNair*, 413 U.S. 663 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971). Most recently, the Court declared that aid to pervasively sectarian schools impermissibly advances religion when it constitutes a subsidy to the "primary religious mission" of the institutions affected. *Grand Rapids v. Ball*, 53 U.S.L.W. at 5009.

There is no dispute that the Inland Empire School of the Bible is a pervasively sectarian institution. That alone is sufficient to render the state aid in question unconstitutional. Moreover, even if the Inland Empire School of the Bible were found to have a secular side, it would make no difference as to the case at the bar. *Amici* submit there can be no question that funds used to train a future minister serve a non-secular purpose. Such funds constitute a subsidy for the school's primary religious mission, and must be found unconstitutional.

b. While Inland Empire is a Recipient of Aid Also Available to Others, the Court Below was Correct in Determining the Sectarian Purpose Herein by Focusing Specifically on the Bible School

Petitioner contends that the decision of the Washington Supreme Court should be overturned because when examined as a whole, the statute at issue has a legitimate primary effect. However, this Court has explicitly and unambiguously refused to support the notion that a "law found to have a 'primary' effect to promote some legitimate end . . . is immune from further examination to ascertain whether it also has the direct and immediate

5. In *Committee for Public Education v. Nyquist*, 413 U.S. 756, where this Court disallowed a New York tuition reimbursement program which included direct state grants to parents who send their children to non-public schools, it emphasized that the state had made no endeavor to guarantee the separation between secular and religious educational functions and to ensure that state financial aid supports only the former. *Id.* at 783. Here, petitioner does not even contend that the aid he seeks would support a non-religious educational function of the school.

effect of advancing religion." *Nyquist*, 413 U.S. at 784 n. 39 (1973).

In one case after another involving state aid to private institutions of higher education, this Court has focused not on the merits of state programs as a whole, but rather on the eligibility of specific sectarian recipients. In *Roemer*, for example, the issue was whether four Catholic colleges in Maryland could receive state funds available to all private schools of higher education in that state. *Roemer*, 426 U.S. 736 (1976). In *Tilton v. Richardson*, 403 U.S. 672 (1971), this Court focused specifically on four church-related colleges in Connecticut to determine their eligibility for federal grants also offered to many other schools. In *Hunt v. McNair*, 413 U.S. 663 (1973), the case relied upon by the Washington Supreme Court, this Court considered the eligibility of one Baptist-controlled college to benefit from the issuance of revenue bonds intended to support all private colleges in South Carolina. In each of these decisions, the Court recognized the secular nature and overall merit of the states' efforts to assist private colleges and universities. Nevertheless, as the *Hunt* Court emphasized, to identify primary effect it is necessary to narrow the Court's focus "from the statute as a whole to the only transaction presently before us." *Hunt*, 413 U.S. at 744. To do otherwise here would be to depart from establishment clause precedents which have served effectively to ensure the separation of church and state.

2. *A State Cannot Directly Transmit Aid to the Non-Secular Educational Function of a Sectarian Institution*

In *Grand Rapids v. Ball*, this Court stated that "direct aid to the educational function of [a] religious school is indistinguishable from the provision of a direct cash subsidy to [a] religious school that is most clearly prohibited under the Establishment Clause." *Grand Rapids*, 53 U.S.L.W. at 5012. *Witters* involves precisely such direct aid, because the Washington program at issue provides financial assistance to each school in which a visually handicapped student enrolls. Larry Witters would have the

state provide aid to the educational function of the Inland Empire School of the Bible on his behalf. The state correctly perceived that it could not legally do so.

When considering cases involving aid to sectarian institutions, this Court has frequently observed that the form which the aid takes is critical. *E.g.*, *Mueller v. Allen*, 463 U.S. 388 (1983); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). In this case, the United States as *amicus curiae* in support of the petitioner concedes that "recent decisions of this Court have found many forms of direct assistance to religious institutions, including schools, troublesome." Brief of the United States as *Amicus Curiae* at 9. However, petitioner and the *amici* supporting him have mischaracterized this case by failing to acknowledge that Washington's practice is to forward the funds in question directly to schools rather than to individuals. Brief for Petitioner at 23. In other words, the aid in this case would take the form of direct assistance to a religious school, and this is a distinction which makes a difference.⁶

Amici submit that attempts to analogize this case to Veterans Administration programs which provide aid to individual veterans and to programs of governmental assistance for students are misleading. The United States brief is accurate when it observes: "generally speaking, when benefits are provided to individuals, the government does not require that the individual use the aid for nonreligious purposes or in nonreligious settings. . . on the other hand, when aid is provided directly to institutional grantees, limitations are often placed on the aid to ensure that it is used for secular purposes and not diverted to religious ends." Brief of the United States as *Amicus Curiae* at 19-20. That brief errs, however, when it categorizes the Washington program as an example of aid to individuals. If Witters were granted the aid he seeks, it

6. This Court has not been satisfied with avowed statements of purpose, occasionally perceiving them as "legal fictions." See *Grand Rapids v. Ball*, 53 U.S.L.W. at 5012 (1985); see also *Stone v. Graham*, 449 U.S. 39 (1980). Here, if there is any fiction involved, it is factual rather than legal. The Court should not be misled by petitioner's attempt to mask the nature of the aid.

would take the form of a State of Washington check made payable to and transmitted directly to the Inland Empire School of the Bible.

C. State Aid Directed to the Inland Empire School of the Bible on Larry Witters' Behalf Would Represent an Unconstitutional Endorsement of His Religion

This Court has recognized that "when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 432 (1962). Government is consequently precluded from conveying or attempting to convey a message that a particular religious belief is preferred, because "such an endorsement infringes the religious liberty of the non-adherent." *Jaffree*, 53 U.S.L.W. at 4674 (O'Connor, J., concurring).

The Inland Empire School of the Bible trains pastors, missionaries and church youth directors -- religious professionals who often seek to proselytize and to impress their religious views on others who are uncommitted, including impressionable public school children. *See Young Life Youth Ministers' Activities Raise Policy Issues for Educators*, Education Week (October 28, 1983). For government to pay for the training of these religious ministers is unmistakably to convey "endorsement of a particular religious belief, to the detriment of those who do not share it." *Thornton v. Caldor*, 53 U.S.L.W. 4853, 4856 (U.S. June 26, 1985) (O'Connor, J., concurring). Such a message would be contrary to the very essence of the first amendment.

II.

THE WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND DID NOT VIOLATE LARRY WITTERS' FREE EXERCISE RIGHTS BY DENYING HIM FUNDING FOR HIS MINISTERIAL TRAINING

The free exercise clause of the first amendment generally comes into play when a central religious tenet is at stake and some form of government action or coercion burdens that tenet. *See Thomas v. Review Board*, 450 U.S. 707, 719 (1981). As this Court has recognized, "to condition the availability of benefits upon [one's] willingness to violate a cardinal principle of [one's] religious faith effectively penalizes the free exercise of . . . constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

Petitioner has never asserted that the state is requiring him to violate a cardinal principle of his faith. He could not make such an assertion, because the state has not compelled or coerced him to violate his religious beliefs. All the state has said is that it has no obligation to subsidize his ministerial training.⁷ Larry Witters remains free to practice his religion and to pursue whatever career he chooses.⁸ He simply has no free exercise right to have the government pay for him to become a pastor, a missionary or a church youth director.

Petitioner's discussion of the free exercise clause focuses on the fact that the state is treating him in a "disparate manner solely because he has chosen a religious career." Brief for Petitioner at 40. This "inequality" has nothing to do with free exercise, but rather is grounded in the special constitutional protection barring establishment of religion. *See supra* section IA. Contrary to Witters' contention that he "may not be disqualified solely

7. In fact, the state has an affirmative responsibility under the Constitution not to fund his ministerial training. To do otherwise would be a violation of the establishment clause. *See supra* section I.

8. *Amici* recognize that the state's refusal to subsidize the petitioner's ministerial training may affect his career choice, but not all disincentives to religious practice amount to violations of constitutional rights. *E.g.*, *Thornton v. Caldor*, 53 U.S.L.W. 4853 (U.S. June 26, 1985).

because of his religious career choice," Brief for Petitioner at 45, *amici* submit that his religious career choice requires the state to treat him differently.

If free exercise rights are implicated in this case at all, it is the rights of Americans of faiths other than Witters -- or those who are not religious -- not to pay for his ministerial training with their tax dollars. As this Court has recognized:

[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical . . . even forcing him to support this or that teacher of his own persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern. . . .

Everson v. Board of Education, 330 U.S. 1, 13 (1947). The Solicitor General concedes it is for the Court to decide "when, or whether, an individual beneficiary's use of tax-supported governmental financial assistance may be restricted because of the religious implications of the expenditure." Brief of the United States as *Amicus Curiae* at 15, *Bender v. Williamsport*, No. 84-773 (distinguishing *Bender* from *Witters*).

The individual freedom of conscience protected by the first amendment "embraces the right to select any religious faith or none at all." *Jaffree*, 53 U.S.L.W. at 4669. Accordingly, *amici* submit the free exercise mandate stands for the proposition that one person's tax dollars should not support another's ministerial training.

III

THE WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND'S DECISION NOT TO SUBSIDIZE WITTERS' RELIGIOUS TRAINING IS MANDATED BY THE WASHINGTON STATE CONSTITUTION.

The foregoing portion of this argument assumes that the Court will reach the federal constitutional question raised in this case and affirm the Washington Supreme Court's decision. However,

in light of the independent separate state constitutional grounds which exist for the decision below, *Witters*, 689 P.2d at 55, this Court need not now undertake to review that decision at all.

In the absence of a free exercise right to funding in this case, no federal mandate exists to outweigh Washington's compelling interest in maintaining the strict separation of church and state required by the Washington State Constitution. The religion clauses of the state constitution require that no public funds be appropriated or applied to any religious worship, exercise or instruction, Wash. Const. art. I, § 11, and that no school under sectarian "control or influence" be supported wholly or in part by public funds, Wash. Const. art. IX, § 4. These provisions so clearly dispose of the instant case that the Washington Supreme Court found it unnecessary to discuss them in detail. Though that court's opinion discusses more extensively the federal question, its resulting decision rests on both independent state constitutional grounds and first amendment considerations. *Witters*, 689 P. 2d at 55.

This Court has traditionally declined jurisdiction when a state's highest court rests its decision on an independent and adequate state substantive ground. *Herb v. Pitcairn*, 324 U.S. 117 (1945). Most recently, the Court has limited this doctrine to those instances where the state court decision clearly articulates separate, adequate and independent state law grounds, see *Michigan v. Long*, 103 S.Ct. 3469, 3476 (1983), and where the state law determination is not dependent upon federal law. See *Ake v. Oklahoma*, 53 U.S.L.W. 4179, 4181 (U.S. Feb. 26, 1985). In the case herein, the state court opinion is a "plain statement" of the independent state and federal bases underlying the court's decision. See *Michigan v. Long*, 103 S.Ct. at 3476; *Witters*, 689 P.2d at 55.⁹

9. Moreover, the Court has followed a policy of "strict necessity" in deciding whether to adjudicate federal constitutional issues when the record presents other grounds for disposing of the case. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734-735 (1978); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569 (1947). "Like the case and controversy limitation itself and the policy against entertaining political questions, it [the policy of "strict necessity"] is one of the rules basic to

This Court should be particularly sensitive to a state's interpretation of its own constitution. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *State of Minnesota v. National Tea Company*, 309 U.S. 551, 557 (1940). See also *Sires v. Cole*, 314 F.2d 340 (9th Cir. 1963), *cert. denied*, 374 U.S. 847 (1963) (holding that the Washington Supreme Court's decisions construing provisions of the state constitution are binding upon the federal courts). When the state court opinion relies on similar provisions in both the state and federal constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving the Supreme Court of jurisdiction to review the state judgment. See, e.g., *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965).

The provisions in the Washington Constitution concerning public aid to religious establishments are contained in Articles One and Nine. Article I, Section 11 provides:

No public money or property shall be appropriated for, or applied to any religious worship, exercise or institution, or in support of any religious establishment.

Article IX, Section 4 provides:

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

The two administrative agencies and the Washington Superior Court all declined to allow Witters to use vocational funds for ministerial training because the state constitutional prohibition governing the use of public funds for religious instruction is absolute. *In re Larry Witters*, No. 0480A - 237 (Dept. of Social and Health Services, Office of Hearings, Oct. 23, 1980 and Dec. 30, 1980), *Witters v. State of Washington Commission for the Blind*,

the federal system and this Court's appropriate place within that structure." *Rescue Army*, 331 U.S. at 570.

No. 80-2-04706-4 (Supr. Ct. of the State of Washington, Spokane County, Verbatim Report of Proceedings before Hon. Marcus M. Kelley, December 11, 1981).

In affirming the lower court decisions, the Washington Supreme Court recognized that Witters is prohibited under the state constitution from using his vocational funds for training as a minister. According to the Court:

Since our state constitution requires a *far stricter* separation of church and state than the federal constitution (see *Weiss v. Bruno*, 82 Wash. 2d 199, 509 P. 2d 973 (1973)), it is unnecessary to address the constitutionality of the aid under our state constitution.

Witters, 689 P.2d 53, 55 (1984) (emphasis added).¹⁰ Both *Witters* and *Bruno* stem from a line of precedents in which the Washington Supreme Court has required strict enforcement of the provisions of the religion clauses of the state's constitution.¹¹

10. In *Weiss v. Bruno*, the Washington Supreme Court struck down two legislative statutes as unconstitutional under the state constitution's religion clauses. One statute provided financial assistance to "needy and disadvantaged" students attending public or private schools; the other established a tuition supplement program to undergraduates attending independent or private institutions of higher learning. The court declared that "there is no such thing as a 'de minimis' violation of art. IX § 4." *Weiss v. Bruno*, 509 P. 2d 973, 978. The court's language echoes an earlier warning by Justice Clark that "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent." See *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963). The prohibition against the use of public funds in payments to schools or students attending schools or universities under sectarian "control or influence" is absolute. *Weiss*, 509 P. 2d at 978. It is constitutionally irrelevant that the public funding is minimal, affects both public and private school students alike, and is transferred to the student rather than to the school or college. *Id.* at 978-981. "Any use of public funds that benefits schools under sectarian control or influence -- regardless of whether that benefit is characterized as 'indirect' or 'incidental,' is a violation of art. IX § 4. The provision permits no exceptions. *Id.* at 981.

11. See, e.g., *Visser v. Nooksack Valley School District*, 33 Wash. 2d 699, 207 P. 2d 198 (1949). In *Visser*, the Washington Supreme Court declined to allow schoolchildren attending religious and sectarian schools to use buses provided by the school district for transportation of public school students to and from school. Though this Court has given states the option of permitting such transportation, see *Everson v. Board*

Consequently, in accordance with the mandate of the Washington Constitution as interpreted by the state's highest court, the Washington Department of Services for the Blind was obligated to deny funding for Larry Witters' religious training. The seven-judge Washington Supreme Court majority affirmed the Department's holding on the state constitution. By invoking *Weiss v. Bruno* as a dispositive precedent, *see Witters*, 689 P. 2d at 55, the majority avoided a repetition of the very detailed analysis of the state constitution's religion clauses contained in *Weiss*, but nevertheless made clear that an independent and adequate state ground existed to dispose of the case. *See Michigan v. Long*, 103 S.Ct. at 3476. Therefore, this Court should not review the state judgment.

of Education, 330 U.S. 1 (1947), the Washington Supreme Court adopted a stricter standard so as to avoid violating the state constitution. *Visser*, 207 P. 2d at 204-205.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be affirmed.

Dated: August 2, 1985

Respectfully submitted,

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OFFICE OF THE ATTORNEY GENERAL

May 16, 1985

Mr. Steve Freeman
Legal Assistance Department
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Dear Steve:

In our telephone conversation a few days ago you asked whether or not there was a written policy or rule which existed concerning the payment of vocational rehabilitation funds. I have checked with the Department of Services for the Blind. They have indicated to me that there is no written policy or a rule that has promulgated indicating how payment would be made for persons eligible for the vocational rehabilitation services. However, the practice has always been to pay the school or training facility directly. This has gone on since the beginnings of the program. No one has been able to remember a time when the money was given directly to the individual.

The reason for this is to make sure that the individual does not take the money and spend it on something else. Further, if the individual withdrew from school for any reason, the state could receive a refund from the institution involved. There are other reasons too, but I will not reiterate them all.

Therefore, in response to your request, I make the following statement. Washington State's practice is to provide the money directly to the institution involved and not to the individual. This is not an entitlement program such as the educational program of the Veteran's Administration. In the latter situation, the money was sent directly to the veteran.

I am also enclosing a copy of Article 1, Section 11, and Article 9, Section 4, of the Washington State Constitution. These sections form the basis of the Department of Services for the Blind's refusal to fund Mr. Witter's career choice. Further, I am enclosing copies of RCW 74.18.020(4) and 74.18.130 through 180, which are the current statutes governing the vocational

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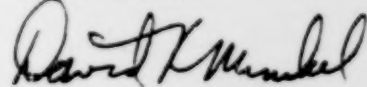
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May 16, 1985

rehabilitation program that Mr. Witters would be receiving services from. I also enclose copies of the former statute under which Mr. Witters applied for services which are RCW 74.16.181, 183 and 300. The latter statutes have been repealed with the adoption of chapter 74.18 Revised Code of Washington.

I trust this will be of assistance to you.

Yours truly,



DAVID R. MINIKEL
Assistant Attorney General

DRM:sj

Enclosures

(14)
No. 84-1070

Supreme Court, U.S.

FILED

AUG 2 1985

JOSEPH E. BRADY, JR.,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

LARRY WITTERS,

Petitioner,

—v.—

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

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CIVIL LIBERTIES UNION AND THE AMERICAN
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QUESTIONS PRESENTED

1. Whether this case should be remanded for a decision on state constitutional grounds.

2. Whether the denial of government financial assistance to a person studying for the ministry is compelled by the Establishment Clause of the First Amendment.

3. Whether the State violates petitioner's right to free exercise of religion by refusing to pay for his religious training.

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INTERESTS OF AMICI^{*}

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to the protection of civil rights and civil liberties. The American Civil Liberties Union of Washington is one of the state affiliates of the ACLU.

The ACLU and its affiliates are committed to the principles of separation of church and state and the free exercise of religion. Amici believe the values underlying the Religion Clauses are best served when government maintains a position of neutrality with respect to religion, avoiding both preference for and discrimination against religion, while respecting the free exercise of religion.

^{*} The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court.

The ACLU and its affiliates have frequently participated in litigation involving public financial assistance to religion in order to preserve the principle of church-state separation, which is one of this nation's most significant contributions to contemporary civilization.

STATEMENT OF THE CASE

Petitioner Witters seeks review of the decision in Witters v. State Commission for the Blind, 102 Wash.2d 625, 689 P.2d 53 (1984); Appendix to the Petition for Certiorari ("Pet. App.") at A-1. The Washington Supreme Court there affirmed the decision of the Washington State Commission for the Blind ("Commission") to deny petitioner's request for financial vocational assistance because he was "studying to be a pastor, missionary, or church youth

director." 689 P.2d at 55. The court concluded that to provide financial assistance in such circumstances would violate the Establishment Clause of the United States Constitution, as well as the stricter church/state separation provisions of the State Constitution.

Witters was enrolled at the Inland Empire School of The Bible. Inland is a private institution, providing a "non-denominational" Christian education. Witters was pursuing, at first, a three year Bible diploma course which he then expanded to a four year Biblical Studies degree course. That course of study included classes in the Old and New Testaments, ethics and church administration. (See Washington Superior Court Findings of Fact and Conclusions of Law; Pet. App. at C-1 et seq.).

Witters, who is legally blind, sought financial aid pursuant to Wash. Rev. Code

§74.16.181, which empowers the Commission to maintain programs to assist visually handicapped persons, including a program of financial vocational assistance. The Commission has established such a program, funded approximately 80 percent by federal funds and the remainder by state funds.

Although the enabling statute, Wash. Rev. Code §74.16.181, does not expressly contain an exception for persons studying for the ministry, the Commission denied Witters financial benefits because of its own policy prohibiting use of public funds to assist an individual in the pursuit of a religious

career or degree.¹ The Commission was expressly empowered to make such regulations. Superior Court Conclusions of Law, Nos. 2 and 5, citing Wash. Rev. Code §74.16.450, Pet. App. at C-5 and 6. And such regulations were "applied and enforced uniformly." Id. at C-6.

SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment must mean at least this: that the government cannot pay for the religious schooling of the clergy. The involvement of

¹ The Commission's policy provides as follows:

"Private institution or out-of-state institution. The Washington State Constitution forbids the use of public funds to assist an individual in pursuit of a career or degree in theology or related areas."

Pet. App. at C-4.

the state in that most intimately sectarian enterprise would be inconsistent with the historical foundations of religious liberty in this country, as well as all of this Court's Religion Clause jurisprudence.

This case presents an unusual fact pattern in Establishment Clause litigation, because it deals with a state's denial of benefits to an individual seeking to use those benefits for a religious prupose. In previous cases, the Court has been asked to define the restraints imposed by the Establishment Clause on government attempts to channel public resources to support

religious education.² Nonetheless, traditional and well-established First Amendment principles must be utilized to resolve petitioner's claim.

In this case, to permit the government funding sought by the petitioner would be a direct and substantial aid to religion, of just the sort this Court has repeatedly held violates the Establishment Clause. And to

² See e.g., Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Wheeler v. Barrera, 417 U.S. 402 (1974); Meek v. Pittenger, 421 U.S. 349 (1975); Roemer v. Board of Public Works, 426 U.S. 736 (1976); Wolman v. Walter, 433 U.S. 229 (1977); New York v. Cathedral Academy, 434 U.S. 125 (1977); Committee for Public Education v. Regan, 444 U.S. 646 (1980); Mueller v. Allen, 463 U.S. 388 (1983); Grand Rapids School District v. Bell, 53 U.S.L.W. 5006 (U.S. July 1, 1985); Aguilar v. Felton, 53 U.S.L.W. 5013 (U.S. July 1, 1985).

the extent that such aid is therefore withheld, by command of the Establishment Clause, any consequent burden on the free exercise of petitioner's religion occurs by operation of the Constitution itself, and is therefore not subject to state "accommodation."

Finally amici contend that the Court should refrain entirely from deciding this case on the basis of federal constitutional law and, instead, remand it to the Supreme Court of Washington for a decision on state law grounds.

ARGUMENT

I.

THIS CASE SHOULD BE REMANDED FOR A DECISION ON STATE CONSTITUTIONAL GROUNDS

The Washington Supreme Court's opinion below was premised solely on the validity of the Commission's policy on federal constitutional grounds. That court stated:

Since our State Constitution requires a far stricter separation of church and state than the federal constitution, it is unnecessary to address the constitutionality of the aid under our state Constitution.

Witters v. State Commission for the Blind, 689 P.2d at 55.

Under the circumstances, this Court should not reach out to decide a difficult question of First Amendment law where a determination on state constitutional grounds is concededly available. See, e.g., Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); Burton v. United States, 196 U.S. 283 (1905); Berea College v. Kentucky, 211 U.S. 45 (1908). Rather, this Court should remand to the Washington Supreme Court for a determination on state constitutional grounds.

There are sound jurisprudential reasons why this Court should refrain from deciding cases on federal law grounds when an adequate

independent state ground exists: Courts ought not to render advisory opinions; considerations of federalism and respect for state sovereignty should limit federal court intervention where state concerns may be resolved under state law; state constitutions can typically be amended with much greater ease than the federal charter, but if state courts are not encouraged to assume responsibility for interpreting and applying state law, these democratic processes at the state level are frustrated; and the Court's burdened docket may be relieved. See Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491 (1984) (Utter, J., is author of the dissenting opinion in Witters below).

That rule of prudence is not diminished by this Court's recent decision in Michigan

v. Long, 463 U.S. 1032 (1983). There, the Court determined that:

when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so.

Id. at 1040-41 (emphasis added).

Michigan v. Long created a presumption that cases involving both state and federal claims should be deemed to have been resolved on federal grounds only when it is unclear whether an adequate and independent state law ground existed. It is critical to the Long decision, we believe, that there was no basis -- either in the text of Michigan law or in readily available precedent --

to think that Michigan's guarantee against unreasonable search and seizure would be interpreted any differently than the comparable federal protection. That is not so in this case.

Here, the Washington State Constitution specifically pertains to the facts of this case: "No public money ... shall be appropriated for ... any religious ... instruction. ..." ³ And

³ The Washington State Constitution provides:

Religious Freedom. . . .
No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.
. . . Article 1, §11.

Sectarian Control Or Influence Prohibited. All schools maintained or supported wholly or in part by public funds shall be forever free from sectarian control or influence. Article 9, §4.

furthermore, the Washington Supreme Court has unambiguously interpreted the Washington Constitution to require a stricter separation between church and state than the First Amendment. 689 P.2d at 55.

State law is thus an adequate and independent ground for resolving petitioner's claim.⁴ Accordingly, the exercise of federal jurisdiction is inappropriate here. This case should therefore be remanded to the Washington state courts for resolution of the state constitutional issue.

⁴ Of course, if petitioner had a viable federal Free Exercise claim, certiorari might be appropriate to assure that the application of state law did not infringe on that federal right. Here, however, petitioner's Free Exercise argument is without merit (see discussion infra), was thoroughly rejected below (689 P.2d at 57) and does not warrant plenary review by this Court. Therefore, the writ should be vacated as improvidently granted.

II.

THE DENIAL OF GOVERNMENT
FINANCIAL VOCATIONAL
ASSISTANCE TO A PERSON
STUDYING FOR THE
MINISTRY IS COMPELLED BY
THE ESTABLISHMENT CLAUSE
OF THE FIRST AMENDMENT

The petitioner was denied government financial benefits, otherwise available to all medically qualified applicants (which Witters concededly was) solely because he was studying for the ministry.⁵ The Commission denied those benefits based on its policy forbidding the use of public funds "to assist

⁵ This is not a case where the applicant was denied financial assistance merely because he was going to a religious school, out of concern that such financial assistance might indirectly benefit the religious institution even though the applicant was engaged in secular study. See e.g. Board of Education v. Allen, 392 U.S. 236 (1968). Here petitioner concedes that he was going to Inland Bible School for the sole purpose of "studying to become a pastor, missionary or Christian youth director." Pet. Br. at 3.

[an individual] in the pursuit of ...[a] career or degree in theology or related areas." (Sup. Ct. Conclusions of Law, No. 7; Pet. App., at C-7). Although the statute under which the petitioner claims entitlement is facially neutral, the Commission policy was adopted to prevent the unconstitutional sectarian use of state funds.

Clearly, that policy would have been violated by state payment for the education of a minister at a bible college, under the auspices of a public vocational training program. The state's refusal to use state monies to fund religious activities is consistent with the historic purposes of the First Amendment as understood by the Framers and interpreted by recent decisions of this Court.

A. The History and Purpose of the First Amendment Prohibit State Funding of Religious, Training.

The drafters of the Constitution and Bill of Rights envisioned a secular government and provided a guarantee for such government in the First Amendment. This Court has frequently relied on the views of the founding fathers in interpreting the religion clauses. The wisdom and foresight of men such as James Madison and Thomas Jefferson may again offer guidance in determining the issue presented here.

On several occasions this Court has recognized that the religion clauses of the First Amendment had the same objectives, and were intended to provide the same protections of religious liberty, as the Virginia Statute of Religious Liberty which marked an end to the struggle against religious establishment in Virginia. Everson v. Board of Education, 330 U.S. 1, 13 (1947); Davis v. Beason, 133

U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 164 (1878). That statute, written by Thomas Jefferson and sponsored in the Virginia Legislature by James Madison, provided in part "that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever...." Blau, Cornerstones of American Religious Freedom in America, at 78 (1949) (the statute is reproduced in its entirety, beginning at page 77) (emphasis added). The events which led to the eventual adoption of the statute in Virginia provide evidence that its language, and that of the Establishment Clause, mandate that no public funds be used for the support of any ministry.

Prior to the Revolution, Virginia empowered Anglican vestries to levy taxes for ministers' salaries and upkeep of the church. Pfeffer, Church, State & Freedom, 95

(1967). In about 1763 the Baptists, who were the chief victims of religious establishment, petitioned the government "that the church establishment should be abolished and religion left to stand on its own merits." Id. After the Declaration of Independence and the adoption of a state bill of rights, pressure from Baptists, Presbyterians and Lutherans alike finally resulted in the disestablishment of the Anglican Church.

A disestablishment law was passed in 1779, but was followed in 1784 by the Bill Establishing a Provision for Teachers of the Christian Religion (reproduced in its entirety in Everson, supra at 72). The Bill proposed to promote education by levying a tax on each citizen for the support of his declared religion. Proponents of the Bill contended that such aid to religion did not constitute "establishment": the Bill was nonpreferential among Christian sects; it

left the choice of support of any religion to the individual taxpayer; and it was proposed under the welfare power to encourage education.⁶

Both James Madison and Thomas Jefferson were as staunch in their opposition to general and nondiscriminatory support of religion as they were in their opposition to the particular support of any one religion. See Brant, James Madison, The Virginia Revolutionist Ch. 12 (1941); Pfeffer, Church, State and Freedom, supra at 101. Madison condemned the proposed Virginia Bill as a "melancholy mark of . . . sudden degeneracy" from the principle of religious freedom so recently fought for and won. Everson, supra at 68. His opposition to the bill is

⁶ These are some of the very arguments petitioner raises in support of the expenditure of taxpayer monies for his training in the ministry.

embodied in his Memorial and Remonstrance Against Religious Assessments (reproduced in its entirety in Everson, supra at 63).

Similary, Jefferson stated in his Bill for Establishing Religious Freedom that:

It is sinful and tyrannical to compel a man to furnish contributions to the propogation of opinions which he disbelieves and abhors; and it is also wrong to force him to support this or that teacher of his own religious persuasion.

Pfeffer, supra at 101.

In the minds of Jefferson and Madison, the constitutional offensiveness of the Assessment bill was not mitigated by the fact that it left to the individual the selection of the religious instituion to receive the monies:

The same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.

Everson, supra at 65-66.

Finally, the proposition that the Bill was an appropriate exercise of the welfare power because it encouraged education, did not make it any less a religious establishment, as that term was contemplated by Madison. In the last point of the Memorial, Madison argues that if the legislature may infringe on a natural right in the area of religion, justifying it as being in the public interest, then it may likewise infringe on freedom of the press or abolish trial by jury or even sweep away all fundamental rights by invoking the same putative interest. Everson, supra at 71.

The Memorial engendered enough popular opposition to the Assessment Bill to bring about its speedy defeat in 1785. Madison then took the opportunity to introduce Jefferson's Bill Establishing Religious Freedom which won passage. Pfeffer, supra at

101. Madison drew upon his experiences with Virginia's religious legislation in drafting the First Amendment.

Further evidence that the First Amendment religion clauses are not limited merely to preferential establishment may be gleaned from the proceedings in the Senate during its drafting. The Senate had two occasions to limit the bar to preferential establishment only, and refused both times. Journal of Proceedings of the First Session of the United States Senate, at 63-67 (Aug. 25 and Sept. 3, 1791); Pfeffer, supra at 141.

It is clear that the issue before the Court in the present case was contemplated and resolved by the Framers at the time our fundamental freedoms were fixed in the Bill of Rights. They well understood that the training of those aspiring to the ministry is a distinctly religious activity which becomes an "establishment of religion" when funded with public monies.

It would be inconsistent with the ideals of the Framers to allow the State to support petitioner's pursuit of a religious career with public funds. The same constitutional guarantee which assures petitioner's freedom to become a minister, forbids any agency of the state to aid him in securing the religious instruction he seeks.

B. State Funding For Training of a Minister Would Have A Primary Religious Effect in Violation Of The Establishment Clause.

In recent times, this Court has defined the meaning of the Establishment Clause in a succession of cases beginning with Everson v. Board of Education, 330 U.S. 1 (1947). In Everson the Court held:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they

may be called, or whatever form they may adopt to teach or practice religion."

Id. at 15-16. The use of Washington State tax levies to support a student's preparation for the ministry at a religious institution -- Inland Empire the School of the Bible -- clearly falls within the prohibition set out in Everson.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court articulated a three-pronged test for determining the constitutional validity of state action under the Establishment Clause. The continuing vitality of the Lemon test was re-affirmed most recently by this Court in Grand Rapids School District v. Ball, 53 U.S.L.W. 5006 (U.S. July 1, 1985). See also, Aguilar v. Felton, 53 U.S.L.W. 5013 (U.S. July 1, 1985); Thornton v. Caldor, 53 U.S.L.W. 4853 (U.S. June 26, 1985). The principal focus of inquiry in this case is properly the second

prong of the Lemon test, which looks to the primary effect of the state's policy.

1. The Government Financial Assistance Sought by Petitioner Would Be A Direct and Substantial Aid to Religion

The Washington Supreme Court properly held that, in determining whether a state funded program offends the Establishment Clause, it is necessary to consider the application of that program to the specific facts of the case at bar. Indeed, the Washington Supreme Court adopted this Court's analysis of "primary effect" set out in Hunt v. McNair, 413 U.S. 734 (1973):

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us.

Id. at 742.

This Court has examined many government funding programs and has concluded that even where they may be facially neutral, if the

primary effect is the advancement of religion in their application, they will be held unconstitutional. In these cases, the Court customarily finds constitutional violations where the state aid to a sectarian institution is of a direct, as opposed to an indirect, nature.

The most recent example of this pattern is found in the Court's decision in Grand Rapids, supra. The Michigan program provided publicly funded classes for nonpublic school students in classrooms located in, and leased from, local nonpublic schools. This Court held that these programs violated the Establishment Clause of the First Amendment, distinguishing two categories of state aid to religious schools. While recognizing that certain types of support could be deemed to confer only "an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions," 53 U.S.L.W. at 5011, this Court held:

In the second category of cases, the Court has relied on the Establishment Clause prohibition of forms of aid that provide "direct and substantial advancement of the sectarian enterprise." Wolman v. Walter [433 U.S. 229 (1977)]. In such "direct aid" cases, the government, although acting for a secular purpose, has done so by directly supporting a religious institution.

. . . .

This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause.

Id. at 5011-12. See also, Meek v. Pittinger, 421 U.S. 349 (1975) (direct loan of instructional materials to private institutions unconstitutional); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (reimbursement for teacher-prepared tests unconstitutional); Lemon v. Kurtzman, supra

(salary supplements for nonpublic school teachers unconstitutional).

This Court has identified several factors to be utilized in determining whether the provision of state monies to sectarian institutions constitutes direct or indirect aid to religion. These include the purpose for which the state aid is granted, the nature of the benefits provided, and the identity of the recipient of the funds (i.e., student or institution). For instance, in Board of Education v. Allen, supra, the Court recognized that sectarian schools can provide secular education. It upheld a state program of lending secular textbooks to all school children, including those in parochial schools, because the program furthered secular, and not religious, education. The Court found that the program merely provided neutral welfare benefits to all children. See also, Everson v. Board of Education,

supra (state payment of transportation cost for all school children permissible). Thus, when state aid is paid directly to students for a secular purpose, a neutral state program has been upheld, even where a religious institution may be an indirect beneficiary. Allen, supra.

This Court has also approved direct aid to religious institutions of higher education themselves, rather than only to their students, where the aid was provided for an exclusively secular purpose, and was available to both sectarian and non-sectarian institutions alike. Thus, in Hunt v. McNair, 413 U.S. 734 (1973), this Court upheld a state program under which state revenue bonds were issued for purposes of a construction project at a Baptist college. The program was approved, however, only upon finding: (1) that the program had a secular purpose in seeking to aid institutions of higher

education regardless of religious affiliation; (2) that the Baptist College's operations were not significantly oriented toward sectarian education; and (3) that the bond issuance would not have a primary effect of advancing religion because the buildings to be constructed would be used only for secular purposes. In fact, in Hunt, bond proceeds were explicitly not available if "used primarily in connection with any part of the program of a school . . . or department of divinity for any religious denomination." Id. at 736-37.

In Hunt, this Court provided explicit guidance as to how to determine whether state aid to sectarian schools has the primary effect of establishing religion:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when

it funds a specifically religious activity in an otherwise substantially secular setting.

Id. at 743.

This Court could not have been more clear as to the constitutionally appropriate course of action the State of Washington was required to follow when it received petitioner's request to fund his education for the ministry. In the circumstances of this case, the state could not fund his training and still maintain the neutrality required by the Establishment Clause. This direct advancement of religion was properly resisted by the state, and the State's decision was properly upheld by the Washington Supreme Court.

2. State Financing for the Training of Ministers Would Impermissibly Advance Religion

Petitioner attempts to minimize the religious nature of his request by claiming that his studies are merely vocational training, such as commonly granted by the G.I. Bill and other such programs.⁷ However,

⁷ Petitioner asserts that the vocational aid he seeks is constitutionally indistinguishable from the educational assistance provided by the G.I. Bill, 38 U.S.C. §1651, et seq. (1964), as well as other state grant and loan programs for higher education. Pet. Br., at 38. Obviously, however, the constitutional propriety of other educational financing programs is not in issue before this Court, and it would not be appropriate to discuss their constitutionality in the abstract.

In any event, the precedent cited by petitioner, Pet. Br. at 24-26, merely reflects that where state financial assistance programs indirectly aid a religion they may be constitutionally permissible. See e.g. Americans United for the Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn.) aff'd, 434 U.S. 803 (1977); Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972), appeal dism'd 413 U.S. 902 (1973). However, no case has addressed the specific issue of public educational funding for the direct training of ministers.

Blanton is, however, revealing in the (Footnote cont'd.)

in fact, petitioner seeks state funding for his Christian ministerial training at a school primarily sectarian in nature.

Petitioner was not merely asking the state to fund his participation in an educational program relating only tangentially to the sectarian mission of his chosen institution; he was not seeking to obtain a chemistry or a sociology degree at a school with sectarian sponsorship. Rather, by his own admission, his ministerial

context of this case. There, the court stressed that, like the G.I. Bill, the state educational grants were made to the students and were available for any student need, including subsistence. Blanton, supra at 104. But, the same court had previously invalidated a predecessor state educational aid program in which funds were paid directly to the sectarian schools and the student was not allowed any discretion to apply the funds to nonsectarian needs. Americans United for Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974). The Washington program before the Court is more like Dunn, than Blanton in this respect.

training at the Inland Empire School of the Bible was to be comprehensively oriented toward sectarian subjects and preparation for the ministry.

Where the provision of state aid to sectarian higher education has been upheld, this Court has based its decision upon findings that the institutions were not "pervasively sectarian" and that the aid was used for nonsectarian purposes. See, Roemer v. Maryland Public Works Board, 426 U.S. 736, 755-59 (1976). See also, Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, supra. However, it is difficult to imagine a more "pervasively sectarian" institution than the Inland Empire School of the Bible, and the state aid requested by petitioner would directly fund his very specific sectarian activity -- namely, preparation for the ministry.

Under the well established principles articulated by this Court, the Washington Supreme Court correctly found that the provision of state funds would have the primary effect of advancing religion.

III.

THE STATE DOES NOT VIOLATE
PETITIONER'S RIGHT TO FREE
EXERCISE OF RELIGION BY
REFUSING TO PAY FOR HIS
RELIGIOUS TRAINING

Public financial assistance to support petitioner's training for the ministry would so involve the government in religious affairs, and would constitute such a profound symbolic and practical interaction of government and religion, that it is necessarily prohibited by the Establishment Clause. See discussion, supra. In such circumstances, the denial of that aid is compelled by the very framework of religious liberty established in the Religion Clauses of the First Amendment as a whole, and

therefore does not violate petitioner's rights under the Free Exercise clause.

In order to sustain a Free Exercise claim in circumstances such as this case, the petitioner would have to establish that a government policy had the effect of burdening his religion. See e.g. Sherbert v. Verner, 374 U.S. 398 (1963). However, where that alleged burden on religion arises because of the mandates of the Constitution itself -- as opposed to a burden imposed by a rule or regulation the government instituted as a matter of policy choice, free of constitutional command -- then the individual's religious claim cannot take precedence. Wallace v. Jaffree, 53 U.S.L.W. 4665, 4677 (U.S. June 4, 1985) (O'Connor J., concurring); see also Thornton v. Caldor, 53 U.S.L.W. 4853 (U.S. June 25, 1985) holding that a state may not "accomodate" the free exercise of religion to the extent doing so

would constitute an establishment of religion.

This distinction may be illuminated by a comparision of this case with Sherbert, supra and Thomas v. Review Board, 450 U.S. 707 (1981).

In Thomas the individual was compelled "to choose between the exercise of a First Amendment right and participation in an otherwise available public program." 450 U.S. at 716. (The program in Sherbert had the same effect.) However, in both cases the individuals were only put to that choice because they were subject to a neutral government regulation denying unemployment compensation benefits to individuals who were voluntarily out of work for personal reasons. The state was not required to have that rule -- it was a "mere" policy choice, not compelled in any way by the Constitution. Once making its policy choice,

however, Sherbert and Thomas teach that the government may not implement its program in a way that requires a person to abandon the free exercise of religion in order to obtain its benefits. Moreover, the Court specifically held that granting the unemployment benefit to the religious applicant would not itself offend the Establishment Clause because it "does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." Sherbert, supra at 409.

In this case, however, circumstances demand a very different analysis leading to the opposite conclusion. Here, granting the government financial benefit to Witters would directly and substantially involve the government in a particular religion -- specifically, the government would be paying for the religious training of a Christian

minister, which raises constitutional problems of a different order of magnitude than the payment of religiously neutral unemployment benefits. Thus, in this case, any burden on Witters' exercise of religion arises not from the government's imposition of a discretionary policy choice, as in Sherbert and Thomas, but rather from the prohibitions of the Constitution itself. Consequently, in this case the government may not provide the benefits Witters seeks. See Wallace v. Jaffree, supra and Thornton v. Caldor, supra. As Justice Douglas commented in Sherbert:

The fact that government cannot exact from me a surrender of one iota of my religious scruples, does not, of course, mean that I can demand of government a sum of money, the better to exercise them.

374 U.S. at 412.

Furthermore, this Court has already considered and rejected the Free Exercise

claim that Witters offers here. In Committee for Public Education v. Nyquist, supra, the government sought, among other things, to provide direct tuition grants to low-income parents sending their children to private religious schools. In holding that the plan was an unconstitutional violation of the Establishment Clause, the Court also rejected the Free Exercise claim that, without the aid, poor people effectively lose their right to give their children a religious education:

It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education....It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause....In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy...for the burdens experienced by those who must

pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline" and notwithstanding the "high social importance" of the State's purposes...neither may justify an eroding of the limitations of the Establishment Clause now firmly emplaced.

Id. at 788-89 (citations omitted).

The same may be said of Witters: he has an absolute right to study for the ministry, and a law prohibiting him from doing so would certainly offend the Free Exercise Clause. But, notwithstanding the social importance of vocational training for the handicapped, paying for Witters training in the ministry would be an intolerable involvement of government and religion in violation of the limitations of the Establishment Clause. Such payments are not, therefore, permissible.

Petitioner attempts to avoid that conclusion by relying on McDaniel v. Paty,

435 U.S. 618 (1978) and Widmar v. Vincent, 454 U.S. 263 (1981). Neither furthers his Free Exercise claim.

In McDaniel, a Tennessee statute prevented ministers from holding public office. By requiring a person to choose between being a minister, a protected First Amendment right, and seeking public office, the state effectively "conditioned the exercise of one [right] on the surrender of the other." McDaniel v. Paty, supra at 626. However, the Court specifically considered whether precluding ministers from holding public office was required by the Establishment Clause and concluded that, in light of history and practice, Tennessee had not established that it was. 435 U.S. at 628-29. Therefore, as in Sherbert and Thomas, the state statute was not constitutionally compelled and amounted to no more than a discretionary policy which had to

give way to a real burden on the free exercise of religion. As in Nyquist, supra, a different result would follow if the state law were based on a constitutional mandate.

Petitioner also cites Widmar v. Vincent, 454 U.S. 263 (1981) in support of his argument that the state is unconstitutionally exempting him from public assistance in violation of his free exercise rights.

Of course, Widmar was a free speech, not a free exercise case,⁸ and in that sense

⁸ Petitioner claims that in Widmar "This Court held that it was a violation of the Free Exercise Clause to treat religious student groups disparately solely on the religious content of their speech." (Pet. Br., at 46-47). Petitioner is mistaken; this Court explicitly refused to decide the case on free exercise grounds:

Respondant's claim also implicates First Amendment rights of speech and association, and it is on the basis of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which free exercise (Footnote cont'd.)

Witters' reliance is misplaced. In addition, however, Widmar does not strengthen the petitioner's position because the Court there specifically concluded that the religious speech in question had to be permitted only because to do so would not violate the Establishment Clause. Id. at 270-75.⁹

interests are infringed by the challenged University regulation." 454 U.S. at 273, n.13 (emphasis added).

⁹ In Widmar the Establishment Clause was not offended because the "benefit" to religion in that case -- providing a place for a religious club to meet -- was not substantial: there was no outright cash grant of any sort, and though the specific activity -- the meeting -- was religious, the setting was thoroughly secular.

The conclusion that the Establishment Clause was not offended in Widmar is entirely consistent with amici's contention that it would be violated if the public funding requested in this case were permitted. Here, the government benefit in question is an outright cash grant, and that money will be spent for tuition in a Bible College so that Witters can train for the ministry. The resulting aid to religion would be compound and substantial, and would therefore violate Establishment Clause limitations. (Footnote cont'd.)

Indeed, the Court recognized that compliance with the Establishment Clause would be a compelling justification for a content based limitation on religious speech. Id. at 271.¹⁰

By analogy, in this case the petitioner's vocational assistance is permissible only to the extent it is not prohibited by the Constitution. Obviously, if he were studying math at a secular school there would be no problem. And even if he

¹⁰ This Court has repeatedly held that, when religious speech violates the Establishment Clause, it may be prohibited consistently with the Free Speech Clause. For example, when a teacher stands up in front of a public school class and reads the Bible the teacher is engaged in religious speech; but that speech is constitutionally prohibited because the teacher is acting with the authority of the state and therefore the speech violates the Establishment Clause. Abington School District v. Schempp, 374 U.S. 203 (1963). See also Br. of ACLU, et al. as Amici Curiae in Bender v. Williamsport Area School District, No. 84-773.

were studying math at a sectarian school, this Court might find no Establishment Clause problem, see e.g. Board of Education v. Allen, supra. However, here Witters seeks vocational assistance to study for the ministry in a Bible school. In such circumstances, the effect of the financial grant would be directly, substantially and unquestionably to advance religion, and it would therefore violate the Establishment Clause. Therefore, it is not permissible even in the face of petitioner's Free Exercise claim.

CONCLUSION

For the above reasons, amici respectfully request that the case be remanded to the Washington Supreme Court for a determination under state law or, alternatively, that the decision of the Washington Supreme Court be affirmed.
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Respectfully Submitted,

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